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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 967. 54.

HOLZAPFEL'S COMPOSITIONS COMPANY (LIMITED), PETITIONER,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 5, 1900.
CERTIORARI AND RETURN FILED JUNE 16, 1900.

(17,740.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY (LIMITED), PETITIONER,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Rahtjen's American Composition Company is appellant and Holzapfel's Compositions Company, Limited, is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
b the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of May, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

c [Endorsed:] Supreme Court of the United States. No. 626, October term, 1899. Holzapfel's Compositions Company, Limited, *vs.* Rahtjen's American Composition Co. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Jun- 6, 1900. William Parkin, clerk.

d United States Circuit Court of Appeals for the Second Circuit.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant, Appellant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant, Appellee.

Transcript of Record.

Appeal from the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Dec. 11, 1899. William Parkin, clerk.

1 Circuit Court of the United States for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant. } In Equity.

Amended Bill of Complaint.

To the honorable the judges of the circuit court of the United States for the southern district of New York, sitting as a court of equity:

The Rahtjen's American Composition Company, a corporation organized under the laws of the State of New York and an inhabitant of said State, and having its principal place of business in said district, brings this its bill of complaint against Holzapfel's Compositions Company, Limited, which is a corporation organized under the laws of the Kingdom of Great Britain, and is an alien and an inhabitant of the Kingdom of Great Britain and is engaged in business in said district, to wit, at No. 18 Broadway, in said city of New York.

And thereupon your orator complains and says:

1. That on or about the first day of January, 1863, one John Rahtjen invented and devised certain formulas for the manu-
2 facture of paint for ships' bottoms, and thereupon and thereafter engaged extensively in the manufacture of said paints in Germany, and the sale of the same in Germany and other countries, under the trade-mark of "Rahtjen's compositions;" which by reason of their superior quality became generally and favorably known to the public under said trade-mark, and acquired a high reputation; that from and after the death of said John Rahtjen, which occurred as your orator is informed and believes, some time prior to the year 1870, his said business, good will and right to said trade name were acquired by his sons, John and Heinrich Rahtjen, who thereafter continued said business as a partnership under the firm name of "John Rahtjen;" that on or about the year 1870 said "Rahtjen" firm introduced said compositions under said trade-mark into England and the United States, appointing agents for the sale thereof in said countries; that on or about the year 1879 the exclusive right to the business, good will and trade-mark rights of said "Rahtjen" firm in the United States were transferred to the firm of Suter-Hartmann & Company of London, England, at that time the agents of the said Rahtjen firm in England; and that in or about the year 1880, said Rahtjen firm transferred to the firm of Hartmann Brothers of London, England, the exclusive right to manufacture said composition in England, together with their factory, secrets of manufacture and trade-marks; that on June 23d, 1885, said Hartmann Brothers caused to be registered in the United States by Hartmann, Le Doux and Maecker, their agents for the sale of

said compositions in the United States, the trade-mark of "Rahtjen's composition," as by the original or certified copy of the certificate of said registration No. 12336, ready in court to be produced, will more fully appear; that said trade-mark certificate was thereafter duly transferred by said firm of Hartmann, Le Doux and Maecker, to said firm of Hartmann Brothers;

3 that thereafter and on or about June 12th, 1888, a corporation was duly organized under the laws of the Kingdom of Great Britain by the name of "Suter-Hartmann and Rahtjen's Composition Company, Limited," in which the members of said Rahtjen firm became, and have continued to be, stockholders, which said corporation thereafter acquired the business, good will, secrets of manufacture and trade-mark "Rahtjen's composition" from said Suter-Hartmann & Company and Hartmann Brothers, for and throughout England and the United States, and became in all respects the successor of said copartnership; that on or about the 24th day of June, 1891, your orator, the complainant corporation herein, was duly organized, and has ever since legally existed under the laws of the State of New York; that on or about the 31st day of October, 1891, your orator, by agreement in writing under that date, acquired for a very large consideration, from Suter-Hartmann and Rahtjen's Composition Company, Limited, the exclusive business, good will, and trade-mark rights of said corporation, including said trade-mark of "Rahtjen's composition," for the United States.

2. Your orator further shows that long prior to the year 1880, when the predecessors of your orator acquired said business, trademarks and rights of manufacture from said Rahtjen firm, and ever since that date, the formulas, processes and ingredients employed in the manufacture of said "Rahtjen's compositions" have always been kept secret by the proprietors thereof, and great care and vigilance exercised to prevent unauthorized persons from discovering or having knowledge of the same.

3. Your orator further shows that from the earliest date three kinds of said compositions have been manufactured, which have been respectively designated and marked as "No. 1," or "anti-corrosive composition," "No. 2" or "anti-fouling composition,"

4 and "No. 3" or "anti-fouling composition;" that said "No. 1" or "anti-corrosive composition" was and is designed to be applied to metal surfaces, to prevent corrosion by the ingredients of the composition afterward applied; that the "No. 2" or "anti-fouling composition" is a finishing coating applied upon or outside of the anti-corrosive composition upon vessels in fresh waters, to prevent animal and vegetable growths thereupon; and that said "No. 3" or "anti-fouling composition" is a finishing or outside coating for vessels in salt waters, to prevent such growths thereon; that your orator has *always* (also) prefixed the word "American" to the trade-mark "Rahtjen's composition" as applied to the goods of its manufacture; and that since the year 1893, the word "improved" has been prefixed to the trade-mark "Rahtjen's composition" by the said English corporation of Suter-Hartmann and Rahtjen's Composition Company, Limited, to the goods of its manufacture.

4. Your orator further shows that ever since the business of manufacturing and selling said compositions was begun, as aforesaid, the same has been carried on continuously by the several parties possessing the right to the same, including your orator, and said goods have always been marked by said trade-mark "Rahtjen's compositions" and other designating marks, as aforesaid, and great care in such manufacture has always been exercised to maintain a high standard of quality, and large sums of money have been expended in introducing said goods to the trade, thereby securing for said compositions and said trade-mark a high reputation throughout the United States and other countries; that the said compositions so manufactured by your orator and its predecessors and sold under said trade-mark have been known and recognized as superior to other compositions for like purposes, and have been adopted and required to be used as standard paints by the Navy Department of the United States upon its vessels.

5 5. Your orator further shows that, by reason of the presence of the word "Rahtjens" in the corporate name of your orator and in that of said English company from which it acquired its said rights as aforesaid, and the use of said word "Rahtjen" to designate the compositions manufactured and sold by your orator and said English company and their predecessors, the said word has, by long association, become *irreparably* (inseparably) identified with your orator's business, and has indicated and does indicate the origin of the goods of its manufacture; that no one except your orator has the right to manufacture or sell said "Rahtjen's compositions" or to use said name and trade-mark in the United States; that your orator's exclusive right to said trade-mark, as above set forth, has been universally recognized and respected by the public except by this defendant, as hereinafter specifically complained of; and that your orator has thereby secured a large and valuable business in the manufacture and sale of said compositions, which has been and is the source of great profit to your orator.

6. Your orator further shows that said compositions so manufactured and sold by your orator under the trade-mark of "Rahtjen's compositions" have been usually put up by it in sheet and metal cans or drums holding about ten and one-half gallons, which said drums have been marked by the name of "Rahtjen's compositions," together with the other designating marks and words above mentioned, as by samples of your orator's said drums ready to be produced in court will more fully appear.

7. And your orator further shows unto your honors that the defendant, well knowing your orator's exclusive rights in the premises, and since said rights were so acquired by your orator, to wit: since the 31st day of October, 1891, in said southern district of New

6 York and elsewhere without your orator's consent and in violation of its rights as aforesaid, fraudulently and unlawfully and with intent to injure and defraud your orator and unfairly and unlawfully compete with it in business; to unfairly and fraudulently avail itself of your orator's reputation as a manufacturer of paints or compositions for ships' bottoms; to impose upon the public and de-

ceive and mislead the trade and buyers of such paints or compositions, has offered for sale and has sold and is still offering to sell paints or compositions for ships' bottoms under the name of "Rahtjen's," which said goods are and have been in fact inferior, spurious and colorable imitations of the genuine Rahtjen compositions as aforesaid manufactured and sold in the United States by your orator only; and that it, said defendant, has and does put up said spurious and inferior goods in drums in size and shape resembling those used by your orator, and has applied and does apply thereto the words "Rahtjen's composition," together with said words "American," "Improved," "I, anti-corrosive" or "III, anti-fouling," and other marks in imitation of your orator's marks, said drums being of substantially the same size and shape as those of your orator, and here inbefore described, as by samples of said drums with marks thereon attached as by the defendant used, ready in court to be produced will more fully appear; that the said defendant has, during said period; represented and advertised to the public in trade journals and by letter-heads, business cards, and the like, the trade-mark the "Rahtjen's composition" as applied to its own paints or compositions, and that it, said defendant, is the manufacturer of "Genuine Rahtjen's patent compositions," falsely and fraudulently thereby representing and causing it to be understood that such compositions are patented, and that the patent rights thereof belong to the defendant; and that it is also the manufacturer of "American Improved Rahtjen's composition" (as will more fully appear by Exhibits A, B, C and D attached to the original bill of complaint herein); and your orator charges that the use by the defendant of said drums of peculiar size and shape and the attaching thereto of said trade-mark "Rahtjen's composition," and the further use of said other words and marks in connection therewith in imitation of the markings upon your orator's drums and its advertisements as aforesaid, are calculated to deceive the public, and that said statements are all and singular false and untrue; and that the sole and only purpose of the defendant in using such drums, and adopting said trade-mark, and other names and marks as aforesaid, and setting forth such advertisements, has been and is to divert trade from your orator to the defendant and secure the benefit and advantage of the business and reputation which your orator has built up for itself under said name and trade-mark of "Rahtjen" and "Rahtjen's composition," by misleading the public into believing that the said inferior and spurious goods so sold and offered for sale by the defendant, were and are the goods manufactured by your orator, and possess the qualities of superiority in manufacture and materials, which are and always have been characteristic of the goods manufactured by your orator and its said predecessors, and that said acts constitute unfair competition with your orator, in that the defendant thereby seeks to take advantage of your orator's high reputation to secure sales, and is causing and has caused irreparable injury to your orator in this and other respects

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8. And your orator further shows unto your honors on information and belief, that the defendant has sold and offered for sale a

large quantity of said spurious and inferior compositions as and for the compositions of your orator, and in and by bids made by it, said defendant, for contracts upon specifications of the United States Navy Department specifying the compositions of your orator under and by the name of "Rahtjen's No. 1 or anti-corrosive composition" and "Rahtjen's No. 3 or anti-fouling composition" at a less price than that at which your orator has sold, and is offering the same for sale; that the acts of the defendant hereinbefore recited, and the false and fraudulent use of the words "Rahtjen's composition" alone and in connection with said other words "American" and "improved" in its advertisements and labels and otherwise as aforesaid, constitute an unfair and fraudulent competition in business, and are inequitable and unlawful, and have enabled and necessarily have the effect of causing the sale and substitution of the compositions bearing the defendant's labels as and for the compositions of your orator, to your orator's great and irreparable injury, and to the injury of the public; and your orator charges that the defendant by its unlawful acts as aforesaid has derived and is deriving large profits, and has diverted and is diverting the same from your orator and has deprived your orator of sales which it would otherwise have made; that the full amount of such profits which have been so diverted from your orator is unknown to your orator, but it believes the same to be the full sum of fifty thousand (50,000) dollars, and so charges the fact to be.

8

9. And your orator further shows that by reason of the premises aforesaid and by reason of the long, continuous and uninterrupted use of said words "Rahtjen's composition" by it and its predecessors as aforesaid and by reason of the very large and valuable business and good will established and secured by your orator and its predecessors in the United States, your orator has acquired in respect of the words "Rahtjen's composition" certain valuable rights which ought to be protected in equity as against the false and fraudulent use by the defendant of the same or any of them, as hereinbefore set forth, and which rights your orator prays, may be protected as hereinafter more especially prayed.

9

10. And your orator further shows that the continuance by the defendant of its unlawful and fraudulent use of your orator's trade-mark as aforesaid, and of its wrongful and unfair competition, will result in continuously increasing and irreparable damage to your orator, for which your orator has no adequate remedy at law, nor relief except in this court

11. Your orator, therefore, prays:

First. That the defendant, The Holzapfel's Compositions Company, Limited, shall answer each and every allegation herein contained, but not under oath, the same being waived, as if fully and directly interrogated as to each.

Second. That said defendant may be decreed to account for and pay to your orator the profits and income unlawfully by it derived and diverted from your orator as aforesaid, and that upon the entering of a decree herein against the defendant for infringement, and violation of your orator's rights, your honors may proceed to assess

or cause to be assessed under your direction, as well the defendant's said unlawful profits and income as also in addition thereto, the damages sustained by your orator by reason of said acts of the defendant.

Third. That a writ of *subpœna ad respondendum* of the United States of America may issue out of and under the seal of this honorable court, directed to said Holzapfel's Compositions Company, Limited, and commanding it on a certain day to be named, and under a certain penalty, to be and appear in this honorable court then and there to answer all and singular the premises, and to stand to, perform and abide by such further order, direction and decree as may be made against it.

Fourth. That said Holzapfel's Compositions Company, Limited, its agents, servants and employees, and any and all claiming and holding through or under it, may be forever enjoined and restrained from in any form or manner whatsoever, making use of the name "Rahtjen" in connection with any paint or similar composition not manufactured by your orator, and from using said word "Rahtjen" as part of a label or labels, and from using it as part of a mark or brand, or from in any way attaching or applying the name "Rahtjen" by means of labels, stencils, or otherwise, to drums or other packages containing a composition, not of your orator's manufacture, and having the characteristics of paint, and from making use of labels like those herein designated as those used by the defendant, and from advertising or otherwise representing to the public that it is the manufacturer or dealer in compositions designated or identified as "Rahtjen's;" and otherwise in every way enjoining and restraining them and each of them from any and every unlawful and untruthful use of the said name "Rahtjen" and any and every name and word which is substantially like it.

Fifth. That a preliminary injunction may be issued without delay restraining the said defendant, Holzap-el's Compositions Company, Limited, its servants, agents and employees, in every way, as prayed for in the preceding paragraph.

Sixth. That such other and further relief may be granted and decreed to your orator as the equity of the case may require and to your honors may seem meet.

11 And your orator as in duty bound will ever pray.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
By OTTO L. PETERSEN, *Pres't.*
TRACY, BOARDMAN & PLATT,
Solicitors for Complainant.

THOMAS B. KERR,
TIMOTHY D. MERWIN, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
State of New York, County of New York, }

Otto L. Petersen, being duly sworn, deposes and says as follows: That he is an officer, to wit, president of The Rahtjen's American

Composition Company, the complainant herein; that he has read the foregoing amended bill of complaint, and knows the contents thereof; and that he knows to his own knowledge that the matters and things therein stated are true, except as to those which are alleged on information and belief, and that as to those, he believes them to be true.

OTTO L. PETERSEN.

Subscribed and sworn to before me, 22 day of October, 1898.

AUGUSTUS LEE, JR.,
Notary Public, N. Y. Co.

[SEAL.]

12 Circuit Court of the United States for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
against
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant. } In Equity.

The answer of The Holzapfel's Compositions Company, Limited, defendant, to the amended bill of complaint of The Rahtjen's American Composition Company, complainant.

This defendant now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said original and amended bills of complaint contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

This defendant admits the incorporation of the defendant as charged in the said amended bill of complaint.

This defendant admits the issue of certificate of registration No. 12336 in the United States, as charged in the amended bill of complaint, but denies knowledge sufficient to form a belief as to whether the said certificate of registration was regularly applied for and all the requirements of the law complied with, and, therefore, denies the same and calls for proof thereof.

13 And this defendant, further answering, denies that it has in any manner violated or infringed any trade-mark of the complainant, or upon any legal rights of the complainant under the same, or that it has made any profit therefrom or caused any damage to complainant thereby.

And this defendant, further answering, denies that said alleged trade-mark, its validity or the alleged rights of the complainant or its assignors, have ever been acknowledged or acquiesced in by said defendant or by the public, but alleges that on the contrary the said alleged trade-mark has been publicly used in defiance and disregard of any alleged rights of the complainant.

This defendant, further answering, expressly denies each and every

other allegation in the said amended bill of complaint contained, and particularly denies every allegation or charge in said amended bill of complaint that defendant is or has been guilty of unfair or fraudulent competition in trade, or deceptions or unlawful or fraudulent practices of any kind or character whatsoever.

This defendant, further answering, alleges that the words "Rahtjen's compositions" have been in common use for many years past to designate paints for ships' bottoms, and that said paints for ships' bottoms have become generally known by the words "Rahtjen's compositions," and that said words are descriptive and are not the proper subject of a trade-mark.

This defendant, further answering, says that the said compositions or paints for ships' bottoms are not, and have not been, prepared under or according to any secret formula or formulas, but on the contrary the said compositions or paints, and the formulas therefor, were described and claimed in letters patent of Great Britain No. 3920, dated the 29th day of November, 1873, granted to Heinrich Rahtjen, for an improved anti-fouling and preservative composition for ships' bottoms and other submerged structures, whereby was secured to
him, for the term of fourteen years from the date thereof, the
14 exclusive right of making, using and vending to others to be
used, the said compositions or paints for ships' bottoms, as by an exemplified copy of said letters patent of Great Britain here in court to be produced will more fully and at large appear.

And this defendant, further answering, says that the compositions and paints for ships' bottoms, made, used and sold under and in accordance with the formulas, description and specification of letters patent of Great Britain No. 3920 of 1873, as aforesaid, became extensively introduced and known to the public during the life or term of said letters patent by the name of "Rahtjen's compositions," and that said words became the identifying and generic name of the compositions or paints patented, and have ever since so continued to be.

And this defendant, further answering, alleges that by its terms the letters patent of Great Britain No. 3920 of 1873, as aforesaid, and all the rights thereunder or secured thereby, expired on the 29th day of November, 1887, and thereupon the said invention and compositions or paints, and the formulas therefor, became public property, and open to the public to manufacture, use and sell the same, and that there is therefore no trade-mark, or trade-mark rights, in the words "Rahtjen's compositions," to designate said compositions or paints manufactured in accordance with the description and specification of said expired letters patent of Great Britain.

And this defendant, upon information and belief, further alleges that by reason of failure to pay and discharge the taxes due upon or under the letters patent of Great Britain, No. 3920 of 1873, aforesaid, when the same became due and payable, the said letters patent of Great Britain and all the rights thereunder or secured thereby were forfeited, revoked and canceled, and became null and void, on the

19th day of November, 1880 (as by reference to an exemplified
15 copy of the proceedings and decision to forfeit, revoke and cancel said letters patent of Great Britain No. 3920 of 1873, here in court to be produced, will more fully and at large appear), and thereupon the said invention and compositions, or paints, and the formulas therefor, and the word or words used to designate or describe the same, became public property, and open to the public to manufacture, use and sell the same under the designation thereof, by which the same came to be known to the public, and that there is not, therefore, nor can there be, any valid trade-mark or trade-mark right in the words "Rahtjen's compositions" to designate said compositions or paints manufactured in accordance with the formulas or description and specification of said forfeited, revoked and canceled letters patent of Great Britain.

And this defendant, for further answer to said bill of complaint, alleges that for sixteen years last past, and since the forfeiture, revocation and cancellation of said letters patent of Great Britain, No. 3920 of 1873, said defendant and its predecessors in business, to wit: the Holzapfel Brothers, under the firm name of M. Holzapfel & Co., have continuously manufactured, used and sold, under the name of "Genuine Rahtjen's patent composition" or "Holzapfel's improved Rahtjen's composition," or "Holzapfel's improved American Rahtjen's composition," compositions or paints for ships' bottoms, compounded and manufactured according to the formulas, description and specification of the said letters patent of Great Britain No. 3920 of 1873, aforesaid, as well in this country and in foreign commerce and in foreign countries, all of which was a matter of public notoriety and was well known to the complainant and its predecessors in business, and was acquiesced in by said complainant and its predecessors in business.

And this defendant, further answering, alleges that on or about the
. 21st day of April, 1883, the firm of Holzapfel & Co., the pred-
16 ecessors in business of this defendant, made application to comptroller general of patents, designs and trade-marks of Great Britain for the registration of their trade-mark, consisting of three vertical parallelograms on the central one of which is the facsimile signature "Holzapfel & Co." and above the parallelograms are the initials and abbreviations "H. & Co." and below are the words "Stir well before using," the whole surrounded by a circle composed of the words "Rahtjen's anti-fouling compositions for ships' bottoms," for said compositions or paints, in accordance with the then existing laws of Great Britain, and having fully and in all respects complied with the conditions and requirements of said laws, a certificate of registration thereof, in due form of law, was duly issued to said Holzapfel & Co., the predecessors in business of this defendant, on or about the twenty-first day of April, 1883, bearing date on said date, and numbered 32103, and signed by said comptroller general, duly attesting said registration, as by said certificate of registration, or a duly exemplified copy thereof, here in court to be produced, will more fully and at large appear; and that on November 1, 1890, the said trade-mark was renewed and continued in

force, to The Holzapfel's Compositions Company, Limited, this defendant, as the successor in business of said Holzapfel & Co., as by reference to certificate of registration No. 32102, dated November 1, 1890, or an exemplified copy thereof, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the 23d day of October, 1886, the firm of Holzapfel & Co., the predecessors in business of this defendant, made *made* application to the comptroller general of patents, designs and trade-marks of Great Britain for the registration of another trade-mark consisting of three vertical parallelograms, on the central one of which *to* the
17 fac-simile signature "Holzapfel & Co." and above the parallelograms are the initials and ab-reviations "H. & Co." and below the words "Stir well before using," the whole surrounded by a circle composed of the words "Rahtjen's patent anti-fouling composition for ships' bottoms," for said compositions or paints, in accordance with the then existing laws of Great Britain, and having fully and in all respects complied with the requirements and conditions of said laws, a certificate of registration thereof, in due form of law, was duly issued to the said Holzapfel & Co., the predecessors in business of this defendant, on or about the — day of ——, 1886, bearing date on said day and numbered 57999, and signed by said comptroller general, duly attesting said registration, as by said certificate of registration or a duly exemplified copy, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the 23d day of October, 1886, the firm of Holzapfel & Co., the predecessors in business of this defendant, made application to the comptroller general of patents, designs, and trade-marks of Great Britain for the registration of another trade-mark consisting of three vertical parallelograms, on the central one of which is the fac-simile signature "Holzapfel & Co." and above the parallelograms are the initials and abbreviations "H. & Co.," and below are the words, "Stir well before using," the whole surrounded by a circle composed of the words "Genuine Rahtjen's patent composition for ships' bottoms," for said compositions and paints, in accordance with the then existing laws of Great Britain, and having fully and in all respects complied with the requirements and conditions of said laws, a certificate of registration thereof, in due form of law, was duly issued to the said Holzapfel & Co., the predecessors in business of this defendant, on or about the — day of ——, 1886, bearing date
18 on said day, and numbered 58000, and signed by said comptroller general, duly attesting said registration as by said certificate of registration, or a duly exemplified copy here in court to be produced will more fully and at large appear.

And this defendant, further answering, alleges that on or about the 23d day of October, 1886, the firm of Holzapfel & Company, the predecessors in business of this defendant, made application to the comptroller general of patents, designs, and trade-marks of Great Britain for the registration of another trade-mark, consisting of three vertical parallelograms, on the central one of which is the fac-simile

signature "Holzapfel & Co." and above the parallelograms are the initials and abbreviations "H. & Co." and below are the words "Stir well before using," the whole surrounded by a circle composed of the words "Rathjen's patent compositions for ships' bottoms," for said compositions and paints, in accordance with the then existing laws of Great Britain, and having fully and in all respects complied with the requirements and conditions of said laws, a certificate of registration thereof, in due form of law, was duly issued to the said Holzapfel & Co., the predecessors in business of this defendant, on or about the — day of ——, 1886, bearing date on said day and numbered 58001, and signed by said comptroller general, duly attesting said registration, as by said certificate of registration or a duly exemplified copy, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the 23d day of October, 1886, the firm of Holzapfel & Co., the predecessors in business of this defendant, made application to the comptroller general of patents, designs, and trade-marks of Great Britain for the registration of another trade-mark consisting of three vertical parallelograms, on the central one of which is the
19 fac-simile signature "Holzapfel & Co." and above the parallelograms are the initials and abbreviations "H. & Co.," and below are the words "Stir well before using," the whole surrounded by a circle composed of the words "Rahtjen's composition for ships' bottoms," for said compositions and paints, in accordance with the then existing laws of Great Britain, and having fully and in all respects complied with the requirements and conditions of said laws, a certificate of registration thereof, in due form of law, was duly issued to the said Holzapfel & Co., the predecessors in business of this defendant, on or about the — day of ——, 1886, bearing date on said day and numbered 58002, and signed by said comptroller general, duly attesting said registration, as by said certificate of registration, or a duly exemplified copy, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on the twenty-first day of March, 1889, the firm of M. Holzapfel & Co., the predecessors in business of this defendant, made application to the Commissioner of Patents of the United States for the registration of its said trade-mark, consisting of three vertical parallelograms, on the central one of which is the fac-simile signature "Holzapfel & Co." and above the parallelograms are the initials and abbreviations "H. & Co." and below are the words "Stir well before using," the whole surrounded by a circle composed of the words "Genuine Rahtjen's patent composition for ships' bottoms," for said compositions or paints, in accordance with the then existing laws of the United States, and having fully and in all respects complied with the conditions and requirements of said laws, a certificate of registration thereof, in due form of law, was duly issued to said M. Holzapfel & Co., the predecessors in business of this defendant, on the twenty-eighth day of May, 1889, bearing date on said day and numbered 16643,
20 and signed by the Commissioner of Patents, duly attesting said registration, as by said certificate of registration, or a

duly certified copy thereof here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the twenty-seventh day of January, 1890, the firm of M. Holzapfel & Company, by an instrument in writing for a valuable consideration sold, assigned and transferred to this defendant the business of said firm, together with the good will and the trade-marks owned by said firm, and hereinbefore more specifically enumerated and set forth, whereby said defendant became and still is the sole and exclusive owner thereof, as by reference to said instrument in writing, here in court to be produced, will more fully and at large appear.

And this defendant, furthering answering, alleges that on the fourth day of May, 1897, this defendant made application to the Commissioner of Patents of the United States for the registration of its further trade-mark, consisting of the representation of a "propeller" in connection with the words "Holzapfel's compositions" in plain block capitals, printed in black, in a curve above the propeller, for said compositions or paints, in accordance with the then existing laws of the United States, and having fully and in all respects complied with the conditions and requirements of said laws, a certificate of registration thereof, in due form of law, was duly issued to this defendant on the twenty-ninth day of June, 1897, bearing date on said day and numbered 30310, and signed by the Commissioner of Patents, duly attesting said registration, as by said certificate of registration, or a duly certified copy thereof, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that its predecessors in business, to wit, the firm of M. Holzapfel & Co., were the first to put up said compositions and paints in metal drums, and that
21 said drums were so adopted by said firm as one of the means to identify their said compositions and paints from all similar compositions and paints, and that said drums, without variation in shape or pattern, have been used by said firm and by their successor in business, this defendant, continuously ever since.

And this defendant, further answering, alleges that the compositions or paints for ships' bottoms as made, used and sold by this defendant and its predecessors in business, is of unequalled quality and enjoys the highest reputation, and that this defendant and its predecessors in business have expended large sums of money in advertising the same to the public, and that it has acquired a very extensive sale and wide reputation throughout the United States and said foreign nations.

And this defendant, further answering, alleges that on or about the twenty-seventh day of April, 1883, the firm of Hartmann Brothers, being one of the predecessors in business of the complainant, as alleged in the amended bill of complaint, filed their application No. 32194 in the patent office, trade-mark branch, of Great Britain, for the registration of an open hand (usually colored red), with the fingers upward, above which is the word "composition" and below it the words "Hartmann's manufacture," as a trade-mark for said compositions and paints, which application was allowed, as

by reference to an exemplified copy of said application, or of the registered trade-mark thereon, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the twenty-fifth day of June, 1883, John Rahtjen, being one of the predecessors in business of the complainant, as alleged in the amended bill of complaint, — his application No. 32826 in the patent office, trade-mark branch, of Great Britain, for the registration
22 of the words "Genuine Rahtjen's composition for ships' bottoms, &c.," as a trade-mark for said composition or paints, and that said application was opposed, and withdrawn, as by reference to an exemplified copy of said application and proceedings thereon, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the twenty-eighth day of June, 1883, the firm of Suter-Hartmann & Co., being one of the predecessors in business of the complainant, as alleged in the amended bill of complaint, filed their application No. 33858, in the patent office, trade-mark branch, of Great Britain, for registration of the words "Rahtjen's patent composition for ships' bottoms buoys, &c. None genuine without this signature Suter-Hartmann & Co.," (in fac simile), as a trade-mark for said compositions or paints, and that said application was opposed and withdrawn, as by reference to an exemplified copy of said application and proceedings thereon, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the seventh day of July, 1883, John Rahtjen, being one of the predecessors in business of the complainant, as alleged in the amended bill of complaint, filed his application No. 32951 in the patent office, trade-mark branch, of Great Britain, for registration of the words "Rahtjen's composition" as a trade-mark for said compositions or paints, and that said application was opposed and withdrawn, as by reference to an exemplified copy of said application and proceedings thereon, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the eleventh day of January, 1884, the firm of Suter-Hartmann & Co., being on of the predecessors in business of the complain-
23 ant as alleged in the amended bill of complaint, filed their application No. 34419 in the patent office, trade-mark branch, of Great Britain, for the registration of the words "Rahtjen's patent composition for ships' bottoms, buoys, &c., directions. Suter-Hartmann & Co." (in fac simile), as a trade-mark for said compositions or paints, which application, after said applicants had filed a disclaimer in the words following, to wit: "We do not claim the exclusive use of the words 'Rahtjen's patent composition for ships' bottoms, buoys, &c., directions,' or any of such words, except as part of the combination constituting our trade-mark as represented in the annexed, and to which we claim exclusive right," was allowed, as by reference to an exemplified copy of said application, disclaimer and proceedings

thereon, or of the registered trade-mark thereon, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, alleges that on or about the fourteenth day of September, 1888, the Suter-Hartmann & Rahtjen's Composition Company, Limited, being one of the predecessors in business of the complainant, as alleged in the amended bill of complaint, filed their application in the Patent Office of the United States for the registration of an open hand (usually colored red) with the fingers upward, above which is the word "composition" and below it the words "Hartmann's manufacture," as a trade-mark for said compositions and paints, and a certificate of registration numbered 17033, and dated September 17, 1889, was issued therefor by the United States, as by reference to a certified copy of said certificate of registration, or of the file-wrapper, contents and drawing of said application, here in court to be produced, will more fully and at large appear.

And this defendant, further answering, says that in view of said matters hereinbefore set forth, complainant and its predeces-
24 sors in business are estopped from claiming a trade-mark or trade-mark rights in the words "Rahtjen's composition."

Wherefore, and for the causes aforesaid, this defendant wholly denies the equity of the amended bill of complaint and all and all manner of wrongful and unlawful acts wherewith in said amended bill of complaint it is charged, and further denies the right of the complainant to the relief prayed against the defendant in said amended bill of complaint.

All which matters and things this defendant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and it humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(S'd) HOLZAP-EL'S COMPOSITIONS CO., LTD.,
JOHN A. DONALD, *Manager, Defendant.*

McADOO & McADOO,
Defendant's Solicitors, and
F. P. R. SANDS, *Of Counsel.*

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } *ss.:*

John A. Donald, being duly sworn, says: that he is an officer, to wit: the manager in the United States of The Holzapfel's Compositions Company, Limited, the defendant in the above-entitled cause: that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, ex-
25 cept as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN A. DONALD.

Sworn to before me this 19th day of November, 1898.

[SEAL.] ROBERT C. MONROE,
Notary Public (163), *N. Y. Co.*

(Replication in usual form.)

United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant.
} In Equity. No. —.

Proofs for final hearing taken on behalf of the complianant under the 67th rule of the Supreme Court for courts in equity, as amended, before Benjamin Barker, one of the examiners of this court, at 120 Broadway, in the city of New York, at 11 o'clock in the forenoon, on the 13th day of March, 1899.

On consent of counsel for both sides, the beginning of taking said proofs is adjourned to March 14th, 1899, at 11 o'clock in the forenoon.

26 Present: T. D. Merwin, Esq., and Thomas B. Kerr, Esq., of counsel for complainant. William G. McAdoo, Esq., and R. B. McMaster, Esq., of counsel for defendant.

OTTO L. PETERSEN, a witness produced on behalf of the complainant, having been first duly sworn, testified as follows in response to interrogatories by Mr. Merwin:

1 Q. Please state your name, residence, age, and occupation.

A. Otto L. Petersen; 91 Eighth avenue, Brooklyn, N. Y.; 59 years of age; manager of the Rahtjen's American Composition Company.

2 Q. How long have you been connected with the complainant company in this capacity?

A. Since before October, 1891, the time of its organization.

3 Q. About when did the complainant company commence business?

A. October or November, 1891.

4 Q. What is and has been the character of its business?

A. Manufacturing paints for bottoms of iron vessels.

5 Q. Where is its office or place of business?

A. 26 Beaver street, New York city.

6 Q. Describe briefly what paints for ships' bottoms are, and for what purpose designed.

A. They are for the protection of the iron from corrosion, and also to protect the bottoms from fouling and animal growth.

7 Q. Under what name has your company sold these paints?

A. Under the name of Rahtjen's composition.

8 Q. How long has your company used this name?

A. Ever since its organization.

9 Q. Does it still use the name?

A. Yes.

10 Q. What is the quality of the ingredients which you use
27 and have used in compounding these paints?

A. Well, the very best we can buy in the market.

11 Q. What degree of care is and has been used in preparing these paints?

A. The very best we can employ in regard to workmanship.

12 Q. How does the company use the name in connection with the goods or the business?

A. In marking packages I suppose you mean; we stencil them.

13 Q. Do you use the name in connection with your printed literature and letter-heads?

A. Yes.

All testimony regarding the marking or stencilling of packages, or the printing or marking on literature and letter-heads is objected to as secondary evidence, unless the packages and literature and letter-heads themselves are produced and marked in evidence.

14 Q. Does and has your company employed a telegraph or cable address in its business?

A. Yes.

15 Q. What is the address?

A. Rahtjen's.

16 Q. How long has your company used this address?

A. Since its organization.

17 Q. What is the reputation of the goods of your company's manufacture under the name of Rahtjen's composition?

A. Well, they are considered the best in the world.

18 Q. Has this reputation been maintained at all times by the company?

A. It has.

19 Q. State whether the volume of the company's business has increased or diminished since its organization?

A. Increased.

20 Q. Indicate in general terms the volume of the business and the amount of increase from 1891 to 1898.

A. Our business from 1891 to 1892 I judge was about $70,000 a year, and it has almost trebled since then.

28 21 Q. Is the business of the company with private individuals or the Government?

A. With both.

22 Q. Indicate in a general way the character of your company's customers.

A. Well, we have the American Government, the largest steamship companies of the world, both coastwise and foreign.

23 Q. State whether or not your company has ever met with competition in the sale of its Rahtjen compositions by the bids or sales of other manufacturers of goods under the same name.

A. In the year 1896, the end, we were informed by our agents at San Francisco that they had competition with the Government who had called for bids. That is the first time I ever knew we had competition.

24 Q. Who was the competitor at that time, if you know?

A. The defendant in this suit.

25 Q. Who got the contract?

A. Our people.

26 Q. Between December, 1896, and June, 1898, did the Government ask for bids for contracts for furnishing Rahtjen's compositions?

A. Yes.

27 Q. State how often, if you know.

A. Yes, in five or six cases.

28 Q. Did your company bid for these contracts?

A. We did.

29 Q. Were there any competing bids?

A. Not that I know of.

30 Q. Who secured the contracts on these bids?

A. We secured some ourselves here, and some of our agents the others.

31 Q. These contracts then were all awarded to your company or its agents?

A. Yes.

32 Q. When was the next instance of the defendant company entering into competition with your company for the sale of Rahtjen's compositions?

A. In June, 1898, when the Government called for bids.

33 Q. Were you present at the opening of these bids?

A. I was.

34 Q. Where were they opened?

A. In the Navy Department at Washington.

29 35 Q. On what date, if you remember?

A. June 28th, I think it was.

36 Q. How many bids were there?

A. Two.

37 Q. And who were the bidders?

A. The defendant company and ourselves.

38 Q. Who secured the contract?

A. The defendant.

39 Q. In the proposals issued by the Government for these bids of June, 1898, what was called for by the Government?

Objected to as not calling for the best evidence.

A. The blank will show.

40 Q. I show you a blank proposal. State whether or not that was one of the duplicate proposals in blank issued by the Government for bids for the contract in question?

A. It is.

Complainant's counsel offers the blank proposal in evidence, and the same is received in evidence and marked "Complainant's Exhibit Government Proposal of June, 1898, B. B., ex'r."

41 Q. State what particular item in the blank proposal in evidence was the one upon which the bids to which you have testified were made?

A. Class 2, naval supply fund Nos. 1 and 2, on page 2.

42 Q. What is the language of the item which you have just referred to?

A. It is as follows:

"Class 2 (naval supply fund).

1. 2,500 gallons (more or less, as may be required during the fiscal year ending June 30, 1899) Rahtjen's No. 1, or anti-corrosive composition, in 10½-gallon drums, per gallon.....

2. 2,000 gallons (more or less, as may be required during the fiscal year ending June 30, 1899) Rahtjen's No. 3, or anti-fouling composition, in 10½-gallon drums, per gallon....."

30 43 Q. State whether or not since June, 1898, the U. S. Government has called for bids and awarded contracts for Rahtjen's compositions?

Objected to as calling for secondary evidence.

A. Yes.

44 Q. Did the defendant compete with your company for any of these contracts?

Same objection.

A. Yes.

45 Q. Did the defendant secure any contracts from the Government for Rahtjen's compositions?

Same objection.

A. Yes.

46 Q. State whether or not you have ever purchased or caused to be purchased any Rahtjen's compositions from the defendant, and if so, produce the bill of the same?

A. Yes, and I produce the bill herewith.

Complainant's counsel offers the bill in evidence and the same is received in evidence and marked "Complainant's Exhibit Defendant's Bill," and it is stipulated by counsel for defendant that it is the defendant's bill, and that it was duly receipted by the defendant.

47 Q. How long has the complainant sold Rahtjen's compositions to the United States Government?

A. From the organization of the company.

48 Q. How long have you known the defendant company?

A. For about eight years.

49 Q. Has the defendant company been a competitor of yours in the sale of paints or compositions for ships' bottoms, if so,
31 state what brand the defendant has used in such competition, I mean prior to June, 1898?

Objected to as calling for secondary evidence unless the witness, in his answer, produces the marking on the defendant's packages, or other competent evidence, the marking itself being the best evidence of the facts called for in the question—the question calling for secondary evidence; question withdrawn.

50 Q. Was the defendant company a competitor of your company prior to 1898 in the sale of paints for ships' bottoms, and if so, state what name of paint the defendant used in such competition?

Same objection as to the last question.

A. Yes, International, principally; also a green paint, imitation of McInnes.

51 Q. Has your company had any business besides that of manufacturing and selling Rahtjen's compositions?

A. No, not except what belongs to the business of the company.

52 Q. Do you mean connected with the sale?

A. Connected with the sale. Of course we contract for applying it and do apply it in some cases.

53 Q. Did your company ever have, prior to June, 1898, any other competition in the sale of Rahtjen's compositions than what you have testified to?

A. Not that I remember.

54 Q. What injury, if any, has your company suffered from the competition which you have described of the defendant in June, 1898, and since in the sale of Rahtjen's compositions?

A. Well, the loss of the contracts with the U. S. Navy Department. I can't estimate the amount of the damage, but it was great.

32 55 Q. Have any of these competing acts of the defendant, of which you have spoken, occurred since August, 1898?

A. Yes.

It is stipulated and agreed by and between counsel, for the parties hereto that the complainant is a corporation organized and existing under the laws of the State of New York as in the amended bill of complaint alleged.

Cross-examination by Mr. McMASTER:

56 X Q. Have you samples of the packages used by complainant in the marketing of its composition in question showing the marking and alleged trade-mark or trade-name in question?

A. Yes.

57 X Q. You have not produced them?

A. Not here.

58 X Q. Have you samples of the packages used by defendant in the marketing of its composition in question showing the alleged infringing trade-mark or trade-name in question?

A. I have those referred to in the bill which I produced in evidence.

59 X Q. But you have not produced the packages or drums showing the markings used by the defendants?

A. No, sir.

Defendant's counsel renews his objection to all testimony respecting the marking used by complainant on its packages or drums, and also all testimony respecting the alleged infringing marking on the

defendant's packages or drums on the ground that the same is secondary evidence and that the packages or drums themselves are the best evidence and have not been produced.

Complainant's counsel calls the attention of the court to the fact that there has been no testimony offered or adduced by the complainant to which the latter part of the foregoing objection can apply.

33 The balance of the cross-examination is taken *de bene esse* and without waiving any objections heretofore taken.

60 X Q. Does not the complainant company advertise and sell said composition as "Hartmann's Rahtjen's" or "Hartmann's improved Rahtjen's composition," or "Hartmann's manufacture"?

A. Hartmann's manufacture, yes, but I don't remember ever having advertised "improved."

61 X Q. Does not the defendant advertise and sell its composition as "Holzapfel's Rahtjen's" or "Holzapfel's improved Rahtjen's composition" or "Holzapfel's American improved Rahtjen's"?

Complainant's counsel objects to the foregoing question as not proper cross-examination, no foundation whatever for the same having been laid in the evidence-in-chief.

A. Well, there are so many different kinds that they do advertise in their literature that I am not positive. Maybe they do; I can't remember.

62 X Q. Do you remember whether they used any such language on the packages or drums which you say you bought, as evidenced by the bill you have produced, and by the packages or drums which you say you have in your possession?

Same objection.

A. I don't remember what those drums were marked. I may have seen it, but I can't tell you now.

63 X Q. Do you not consider the marking which the defendant places on its drums or packages as of any importance, or as having any bearing in this suit?

Objected to by counsel for complainant as asking for a conclusion of law from the witness, and also upon the same ground as the preceding question.

A. I have never considered it.

34 64 X Q. Does not the complainant mark its drums or packages containing the composition in question with the representation of a red hand, with the word "trade" on one side of the hand and "mark" on the other?

Objected to as incompetent, irrelevant and immaterial.

A. Yes.

65 X Q. And that is invariably so, is it not?

Same objection.

A. There may be some cases where it is not, but I believe it is invariably so.

66 X Q. And do you not place directly under the red hand, on the packages or drums containing the composition of the complainant company, the words "Hartmann's manufacture"?

Same objection.

A. Yes.

67 X Q. Does not the defendant company mark its packages or drums containing its preparations with a "propeller" and the word "trade" on one side of the representation of the propeller and "mark" on the other?

Same objection as to X Q. 61.

A. I don't know.

68 X Q. You have not testified to any use of the alleged trade-mark or trade-name by your company, or by any other person or corporation prior to 1891. Do you desire to be understood that that was the date of adoption and that your company was the first one to adopt the alleged trade-mark or trade-name?

A. I have not testified to anything regarding the trade-mark before 1891. We acquired certain rights when the company was
35 formed into a corporation, and I understood that the trade-mark was "Rahtjen's composition."

69 X Q. Do you mean that you understood the company acquired the right to use the words "Rahtjen's composition" from some other person or corporations?

A. Yes.

70 X Q. How was it acquired, by any written instrument?

A. Yes; by an agreement.

71 X Q. You have not produced that agreement in evidence, have you?

A. No; I have not.

72 X Q. Is that agreement in the possession of your company, the complainant company?

A. Yes.

73 X Q. What was your business prior to the incorporation of this complainant company?

A. Agent of the English company, the Suter-Hartmann & Rahtjen's Composition Company, Limited. I do not remember whether it was a company or corporation at the time I was agent.

74 X Q. You are president of the complainant corporation, are you not?

A. Yes.

75 X Q. When did you first become agent for the sale of the so-called Rahtjen's composition?

A. I believe it was in 1888, as far as I remember.

76 X Q. What was the name of the firm or corporation for which you became agent at that time?

A. It was either Suter-Hartmann & Rahtjen or Suter-Hartmann & Rahtjen Composition Company, Limited.

77 X Q. Was it not Suter-Hartmann & Company?

A. I do not think so.

78 X Q. Was 1888 the year when you first derived any knowledge of the composition or the alleged trade-mark or trade-name in question?

A. Oh, no.

79 X Q. How long prior to 1888 had you any personal knowledge of the composition or trade-mark or trade-name in question?

A. I should say about ten years.

36 80 X Q. How did you acquire your knowledge of said matter prior to 1888?

A. By my being connected with the shipping interests from the time when I was a boy.

81 X Q. Did you, prior to 1888, buy or sell or use said composition?

A. Yes, sir.

82 X Q. Did you do so frequently?

A. Frequently, yes.

83 X Q. What was your business at that time?

A. Ship chandler and contractor.

84 X Q. From whom did you buy the Rahtjen's composition prior to 1888?

A. From Mr. Maecker.

85 X Q. And who was he?

A. Well, he was a partner on this side of Hartmann, Le Doux & Maecker.

86 X Q. Did Hartmann, Le Doux & Maecker manufacture the Rahtjen composition?

A. Not in this country.

87 X Q. Did they manufacture it abroad?

A. That I do not know. It was manufactured abroad.

88 X Q. You do not know who manufactured it?

A. I do not.

89 X Q. Did you, or do you, know of any person or firm or corporation, at the time referred to in the last question, excepting Hartmann, Le Doux & Maecker, making or selling said Rahtjen composition?

A. Nobody except the firm of Hartmann, Le Doux & Maecker.

90 X Q. Have you any books, or records or other data, that will enable us to fix the date when you first bought the Rahtjen composition?

A. I don't think so. I may have.

91 X Q. Before closing your testimony, will you see whether you have such data, and let us know the result?

A. Yes.

92 X Q. During the period that you bought the Rahtjen composition from Hartmann, Le Doux & Maecker, do you remember in what kind of packages the composition was put up?

A. Same kind of drums that we are using at present, if I re-

37 member, but they used to have some wooden barrels, I won't be positive, they might have had wooden barrels at that time.

93 X Q. Do you remember the marking that was put on these wooden barrels or on these drums that you bought from Hartmann, Le Doux & Maecker?

A. No, I do not, it is so long ago I couldn't remember.

94 X Q. Look at the photograph I now show you, and state whether that does not correctly represent the markings on the ends of the wooden barrels which you have referred to?

Question objected to as incompetent, irrelevant and immaterial.

A. I couldn't tell anything about that from that time. All I knew at that time was that Hartmann, Le Doux & Maecker were associated with the Rahtjen composition. According to these two barrels below here, in the photograph, I have never seen Rahtjen's composition put up in those casks. The two upper ones, above those, look like some barrels I have seen containing Rahtjen't composition. We have never put up anything in those wooden barrels.

95 X Q. On these barrel heads represented in this photograph I see the letters S. H. & Co. What do those letters stand for, if you know?

Objected to by counsel for complainant as incompetent, irrelevant and immaterial, the photograph in question not being in evidence, or in anywise identified, and further because not proper cross-examination.

A. I do not know.

96 X Q. Do they not stand for Suter-Hartmann & Company?

A. They might, but I don't know.

97 X Q. Have you any opinion on that subject?

Objected to as not proper cross-examination.

38 A. None whatever.

The defendant's counsel offers in evidence the photograph regarding which the witness has just been examined, and the same is marked "Defendant's Exhibit Photograph of Barrel Heads, B. B., ex'r."

Objected to by counsel for complainant as incompetent, irrelevant and immaterial.

98 X Q. Do you know of any other trade-mark or distinguishing sign or emblem being used by the predecessors of the complainant company in business except the word "Rahtjen," or the words "Rahtjen's composition"?

Objected to as not proper cross-examination, and as incorrectly referring to preceding evidence and testimony.

A. No.

99 X Q. Do you know whether the composition sold by this firm of Hartmann, Le Doux & Maecker bore the word "Rahtjen" or the words "Rahtjen's composition"?

A. I testified a short time ago that I could not tell what the marks were at that time, it was so long ago. I could not say one way or the other.

100 X Q. Do you know of any disclaimer to the words "Rahtjen's patent composition," &c., being made by any of the predecessors in business of the complainant?

Objected to as incompetent, irrelevant and immaterial, and as improper cross-examination.

A. I do not know anything about it.

101 X Q. Do you know of any letters patent of Great
39 Britain issued to Heinrich Rahtjen on November 29, 1873, for said composition in question, substantially such composition?

Same objection.

A. I have heard speak about it, but I do not know anything about it.

102 X Q. All you know about it is by hearsay?

A. Yes.

103 X Q. You heard that there was such a patent?

A. I heard that there was, but I do not know.

104 X Q. Do you know Mr. John A. Donald here present?

A. Yes, sir; I have seen the gentleman before.

105 X Q. How long have you known him in business?

A. About six or seven years I think; that is, by sight.

Adjourned to Monday, March 20, 1899, at 11 a. m.

NEW YORK, *March* 20, 1899—11 a. m.

Met pursuant to adjournment.

Present counsel as before. Also F. B. B. Sands, of counsel for defendant.

Cross-examination of OTTO PETERSEN continued by Mr. McADOO:

X Q. 106. You have referred in your direct examination to bids you have submitted for Government contracts, is it the practice of your company to keep copies of all bids and proposals you make for the sale of your paints or compositions or for the work of painting ships and vessels therewith?

A. It is the custom for us to keep copies of all bids, but not to the Government. Some we do keep for the Government.

40 X Q. 107. In case of private vessels, your practice is then uniform?

A. Yes.

X Q. 109. Did you keep copies of such proposals and bids during the time that you were agent of the Suter-Hartmann & Rahtjen's Composition Company, Limited, the predecessors in business of complainant?

A. In some cases, yes; but I cannot remember if I did in all cases.

X Q. 110. Were the exceptions frequent or not?

A. I don't remember.

X Q. 111. It was generally your practice, however, to do so?

A. It is so long I cannot answer that question.

X Q. 112. You have stated that you have known Mr. John A. Donald by sight; how long have you known him in a business way?

A. I never had any dealings with him except indirectly.

X Q. 113. What business is he now engaged in?

A. As far as I know he is in the paint business.

X Q. 114. What paint?

A. Different kinds. International, one kind, and a so-called Rahtjen's paint, which we consider an infringement on ours. I also believe he is a ship-owner, from what I have heard.

X Q. 115. In what respect do you consider it an infringement?

A. Because I don't believe any others are allowed to use the name of "Rahtjen," or has the right to use "Rahtjen's compositions," excepting our company.

X Q. 116. Why not?

Objected to by counsel for defendant, (complainant) because it asks for a conclusion of law from the witness, and it is otherwise incompetent, irrelevant and immaterial.

A. That is what we are trying to find out.

X Q. 117. Am I correct in understanding that your claim then is that the defendant is infringing on your alleged trade-mark, "Rahtjen's composition"?

A. Yes.

41 X *B.* 118. Do you not know that Mr. John A. Donald is the manager of the defendant corporation?

A. I have seen it advertised as such; I have no other knowledge.

X Q. 119. Did you ever hear of the firm of John A. Donald & Co., agents in New York for M. Holzapfel & Co., in the years 1889 and 1890?

A. I don't remember what year it was when I first saw it advertised or heard of it.

X Q. 120. Was it not prior to 1891?

A. I can't say positive.

X Q. 121. What is your best recollection?

A. I suppose I heard it somewhere about '91, I should think it was.

X Q. 122. What brand of paint or composition did the firm of John A. Donald & Co., agents, sell?

Plaintiff's counsel objects to this and other questions in this line as wholly improper cross-examination, and as otherwise incompetent, irrelevant and immaterial.

A. I always understood International—a brand called International.

X Q. 123. Don't you know that they sold a Rahtjen's composition or paint manufactured by M. Holzapfel Co., as well as International?

Same objection.

A. To my knowledge they never sold any Rahtjen's.

X Q. 124. Don't you know they advertised and were offering to sell such a Rahtjen's paint or composition in 1891, and prior thereto?

Same objection.

A. In '91, and prior thereto—not to my knowledge. Later on I may have seen some of their literature mentioned.

42 X Q. 125. How much later on?

Same objection.

A. It may have been two years.

X Q. 126. What kind of literature was it you saw? State to the best of your recollection the character of the advertisements, if there were such, and what they contained?

Same objection.

A. I remember seeing a book once where they claimed the International was a much stronger anti-fouler than Rathjen's.

X Q. 127. Didn't you notice advertisements as well for Rahtjen's composition manufactured by M. Holzapfel & Company in addition to the International composition?

Same objection.

A. I often remember seeing the name Holzapfel, but I do not remember seeing Rahtjen's manufactured by M. Holzapfel.

X Q. 128. Do you know of, and have you read, and did you read in 1890, or subscribe for, a paper called the New York Maritime Register?

A. Yes.

X Q. 129. Were you an advertiser in that paper during the month of June, 1890, or at any other time in 1890, as agent for Suter-Hartmann & Rahtjen's Composition Company, Limited, predecessor of the complainant?

A. I have been an advertiser there for some years, but cannot say positively if I was an advertiser at that time.

X Q. 130. Have you in your possession a file of the New York Maritime Register for 1890, or any records or copies of advertisements inserted by you in that paper on the 4th of June, 1890, or at any other time during the year 1890?

A. Not that I know of.

43 X Q. 131. Please look at the copy of advertisement signed by Otto L. Peterson, importer and sole agent, which appeared in said journal on June 4th, 1890, and state to the best of your recollection if it is a true copy or substantially a true copy?

A. According to this, I never inserted this advertisement, although I may have had an advertisement in the paper, but this could never be a copy of what I inserted.

X Q. 132. Why not? Because the representation of the hand is not perfect?

A. Oh, no.

X Q. 133. Then give your reasons?

Counsel for complainant objects to this and similar questions as not proper cross-examination, and as irrelevant, incompetent, and immaterial, and that if the witness is to be cross-examined as to such advertisement, the advertisement itself should be produced, properly identified and placed in evidence, and that witness should not be questioned as to a paper which is not even identified as a true copy of any such advertisement.

A. Because I never could put such an advertisement in the paper.

X Q. 134. Do you swear you never inserted such an advertisement, or authorized to be inserted such an advertisement in the New York Maritime Register of June 4th, 1890.

Same objection.

A. As this is worded, I never did. I have stated before that I may have put an advertisement similar to this.

X Q. 135. In what respect is the copy shown you different in wording from the one you think you inserted?

Same objection.

A. My place of business was never in River street. So it cannot be a true copy.

44 X Q. 136. In other respects is it correct?

Same objection.

A. I wouldn't like to say; if one mistake is made, other mistakes might be made.

X Q. 137. Have you examined it carefully, and do you see any other mistakes?

Same objection.

A. I don't know whether it is a copy or not, so I can't say whether there are other mistakes or not.

X Q. 138. To the best of your recollection is it a true copy, with the exception of the word river to which you have referred?

Same objection.

A. I wouldn't like to say.

X Q. 139. As you read the copy of the advertisement now, does it contain anything that you would not likely have inserted in such an advertisement at that time excepting the word "river"?

Same objection.

A. It is so long ago that I really don't know what I would have done then.

Defendant's counsel has marked for identification the transcript or copy of the advertisement above referred to, marked "Defendant's Exhibit Transcript Advertisement Maritime Register, June 4th, 1890, signed Otto L. Peterson, for identification."

X Q. 140. Did you ever see an advertisement in the New York Maritime Register of June 4th, 1890, of Holzapfel Compositions Company, Limited, as manufacturers of "Genuine Rahtjen's patent
45 composition, Holzapfel's manufacture, made according to the original specification," signed, John A. Donald & Company, Wells building, 18 Broadway, agents in New York?

Objected to as incompetent, irrelevant and immaterial.

A. I don't think I did at that time.

X Q. 141. Did you at any time?

A. Several years later, yes.

X Q. 142. How many years later?

A. Two or three years, as I remember.

X Q. 143. Did you or your company at the time you saw such advertisement file any protest with John A. Donald & Company, or with Holzapfel's Compositions Company, Limited, against their using the words "Rahtjen's composition," or "Genuine Rahtjen's patent composition," or words substantially to that effect?

A. Not at that time, to my recollection.

X Q. 144. Did you or your company ever file such a protest or any objection with John A. Donald & Company?

A. Not with John A Donald, to my recollection.

X Q. 145. Prior to the bringing of this suit, did you or your company ever make such protest to John A. Donald & Company or to Holzapfel's Compositions Company, Limited?

A. Not to John A. Donald or to Holzapfel's Compositions Company, Limited.

X Q. 146. Did you not, in the fall of 1889, submit a bid or proposal in competition with John A. Donald & Company for the painting, with Rahtjen's paint or composition, the steamship El Callao?

A. I don't remember; I have no record of it.

X Q. 147. Do you remember the names of any ships or steamers, for the painting of which with the Rathjen's paint or composition you competed for with John A. Donald & Company in the
46 fall of 1889, or at any times during the years 1889 and 1890 and 1891?

A. I have no record whatever before November, '91.

X Q. 148. What have become of the books and records of your business prior to 1891?

A. They were burned up.

X Q. 149. When and how?

A. When we built our new factory.

X Q. 150. When was that?

A. About two or three years ago.

X Q. 151. Do you mean that you voluntarily destroyed them?

A. Yes.

X Q. 152. What is your best recollection as to the competition with John A. Donald & Company during the years 1889, 1890 and 1891 for the painting of ships, steam or sailing, with Rahtjen's paint or composition or the furnishing of Rathjen's paint or composition to such ships?

A. I don't exactly understand what you mean by that.

X Q. 153. The question seems very plain. I mean do you remember the names of any ships of any kind, for the painting of which, with Rahtjen's paint or composition, or for the furnishing or sale to which, of Rahtjen's paint or composition, you ever entered in competition with John A. Donald & Company in the years 1889, 1890 and 1891?

A. No, I do not.

X Q. 154. Do you remember the fact of competition with John A. Donald & Company for the sale of Rahtjen's paint or composition during the years 1889, 1890 and 1891?

A. I never remember coming in actual competition with Donald, except it was in the sale of the International composition. Of course I heard rumors in regard to soliciting of business a great many times, which we took very little notice of, as long as it did not affect us.

X Q. 155. Would not the losing of business by such competition affect you?

A. Yes.

X Q. 156. Don't you remember instances where you lost the painting of vessels, or furnishing with Rahtjen's paint, or the sale
47 of Rahtjen's paint to vessels, or the owners of vessels, in competition with John A. Donald & Company in the years 1889, 1890 and 1891?

A. No.

X Q. 157. Did you not submit a bid in competition with John A. Donald & Company in the month of November, 1889, for cleaning, scraping and painting with Rahtjen's paint the steamship El Callao, and was not the contract awarded to John A. Donald & Company?

A. I have no recollection whatever of that.

X Q. 158. Do you remember the steamers Dorian and Tyrian of the Anchor line?

A. I do.

X Q. 159. Were those ships not painted in the fall of 1889 with Holzapfel's Rahtjen's paint after competition with you for the business?

A. I can't say whether or not, if they were painted and there was competition, I am positive the competition was with the International and ourselves.

X Q. 160. Do you not remember competing with John A. Donald & Company for the painting of the ships Dorian and Tyrian?

A. I do not.

X Q. 161. Have you no recollection on the subject?

A. No, I have not.

X Q. 162. Did you not compete with John A. Donald & Company during the years 1889 and 1890 for the painting with Rahtjen's composition, or supplying with Rahtjen's composition, the following ships, or any of them: Ville D'Ouai, Sheila, Stronsa, Rhone, Rhine, bark Routenbeck, Palgrave, ship, Erne, ship Elbe?

A. I really don't remember whether I competed with them or

not; I may have competed with them for the painting of those vessels, but I always understood it was with the International.

X Q. 163. Did you ever urge ships' captains or ships' owners or agents to see that they got their Rahtjen's composition with the red hand as distinguished from any other make?

A. We always advised the customers—captains or whoever they were—to see that the drums containing the paints were properly marked with our stencil. There might have been a red hand on it, Hartmann's might have been on the drum and several other marks, but always in conjunction with "Rahtjen's composition."

48

X Q. 164. Why did you do this unless you were meeting with competition in the sale of "Rahtjen's paint"?

A. We did it so as to distinguish "Rahtjen's composition" from others who might attempt to infringe.

X Q. 165. Have you not always laid stress on the red hand with the words "trade-mark" imprinted on the wrist thereof as the distinguishing characteristic of the Rahtjen's paint or composition sold by you or the complainant company?

A. Not always.

X Q. 166. Do you not advertise the "red hand" as your trade-mark?

A. That may be mentioned on there, but always together with the "Rahtjen's composition."

X Q. 167. Always?

A. Not always. Years ago some of our literature—letter-heads—did not have the "red-hand" brand marked on it; sometimes it had.

X Q. 168. How is it now?

A. Well, I guess we could show it; it contains the red hand now.

X Q. 169. Before finishing your examination, I ask you to produce samples of your letter-heads, bill-heads, business cards and literature as now used by complainant company. Will you do so?

A. I can do so.

X Q. 170. Will you do so?

A. I will do so if my attorney advises me to.

X Q. 171. Please examine the card I now show you and state if it is one of the business cards of the complainant company? (Hands card to witness.)

A. Yes, sir; this is one of our latest cards.

Defendant's counsel offers in evidence the business card referred to in the preceding question and answer, and it is marked "Defendant's Exhibit Complainant's Business Card."

49

X Q. 172. I ask you to examine the advertisement on page 13 of the Marine Journal, March 18th, 1899, and state if it is an advertisement of the complainant company?

A. It is.

Defendant's counsel offers in evidence the Marine Journal referred to in the preceding question and answer, and it is marked "Defendant's Exhibit Marine Journal, March 18th, 1899."

X Q. 173. Did you not compete with John A. Donald & Company during the latter part of 1889, or early part of 1890, for the painting with Rahtjen's composition of the steamship Rhone, of which Joseph Williams was captain?

A. I may have competed in giving the captain of the Rhone a tender for painting his vessel, but I don't remember what paint Mr. Donald represented to the captain.

X Q. 174. Who got the contract?

A. I couldn't tell you. I don't remember.

X Q. 175. Did you get it?

A. I don't remember.

X Q. 176. Didn't you, after the letting of that contract, have a conversation with Captain Joseph Williams of the Rhone, at the Erie Basin dry dock, when you called his attention specially to the drums containing the Hartmann's Rahtjen's paint, and did you not state to him that no other Rahtjen's paint was genuine unless it had the red-hand brand upon it, and did not Captain Williams thereupon reply that the results of the application of the Holzapfel's Rahtjen paint or composition which he had used was satisfactory, and that if you or your company had the sole right to sell the Rahtjen's paint you should take steps to prevent others from doing so, or words to this effect. Is this not substantially the substance of that conversation?

Objected to as incompetent, irrelevant and immaterial.

50 A. I don't remember Captain Williams, and I don't remember ever having had such a conversation.

X Q. 177. Will you swear that you never had such a conversation?

Same objection.

A. To the best of my knowledge and belief I never had such a conversation.

X Q. 178. Did you ever have such a conversation with Captain Williams anywhere?

Same objection.

A. I said before, I don't remember Captain Williams; I would not know him if I saw him today.

X Q. 179. Has your company complete records of its business from its organization in 1891?

A. Yes.

X Q. 180. You have testified that it was your practice to keep copies of tenders and bids made by you either for the sale of Rahtjen's paint or composition, or for the painting of vessels or ships therewith. Please examine these records and furnish copies of bids you submitted for the sale of Rahtjen's composition or paint to the steamships Mexico, Panama, Cuidad Condal and Habana.

A. If my attorneys advises it I will.

X Q. 181. Did not complainant company make tenders to said

ships for the sale of Rahtjen's paint or composition in the year 1891 or 1892 in competition with the defendant company?

A. We may have done so; I don't recollect it.

X Q. 182. Do you know the firm of Vernon H. Brown & Co. of New York?

A. I do.

X Q. 183. Did not the defendant company compete with you in the sale of Rahtjen's paint or composition to said firm of Vernon H. Brown & Company in 1891 and 1892?

A. Not to my knowledge.

51 X Q. 184. Is it not a fact that your company and the defendant have been in continuous competition in this market and in the United States for the sale of Rahtjen's paint or composition from the date of the organization of your company?

A. We have been in competition, but not to my knowledge, in the Rahtjen's paint, as I have testified before.

X Q. 185. What was the nature of the competition if it was not for Rahtjen's paint?

A. It was in the International paint and for doing work inside of vessels and outside above the bottom of the vessel.

X Q. 186. You testified in your direct examination to competition with the defendant company for a Government contract in 1896 in which the defendant was unsuccessful. Did you make any protest at that time to the defendant because of the use of the work "Rahtjen" as descriptive of its paints, or did you bring any suit against it for an alleged infringement?

A. We did not, as we succeeded in getting the contract, and not wishing to go into litigation, which was very unprofitable.

X Q. 187. You brought this suit then because the defendant was a successful bidder in 1898 for a Government contract, did you?

A. The moment we found the defendant was injuring our business we immediately brought suit.

X Q. 188. The defendant's competition for the Government's contract in June, 1898, was then, the first instance in your recollection, when such competition was injurious, was it?

A. It was the first instance where we found they had done us any injury.

X Q. 189. You don't think, then, that competition for private business with ship-owners and others, even if successful, on the part of the defendant was or is injurious to your business?

A. Yes, I do if I know of it.

X Q. 190. But the contract with the Government was the

52 only injury you have received from competition with the defendant, was it?

A. As regarding the sale of Rahtjen's paint.

X Q. 191. You have stated that you were agent for the United States for Suter-Hartmann & Rahtjen's Composition Company, Limited, from 1888 to October, 1891, when the complainant company was organized. Was the marking of the drums or packages containing the Rahtjen's paint or composition, sold by Suter-Hartmann & Rahtjen's Compositions Company, Limited, in October, 1891, the

same, or substantially the same, as the marks and brands used by the complainant on such packages and drums?

A. Substantially the same, with few exceptions.

X Q. 192. In what respects do they differ?

A. Well, I believe there are a few additional marks.

X Q. 193. By whom?

A. By our workmen.

X Q. 194. What are the additional marks?

A. "N N" and the red hand on the capsules. On some of the drums, the contents of which we manufacture ourselves, the red hand does not appear on the capsules, but appears on the sides.

X Q. 195. What is the capsule?

A. It is the cap over the orifice of the drum.

X Q. 196. In other respects is the marking of the drums of the complainant company the same as the drums of Suter-Hartmann & Rahtjen's Composition Company, Limited, were in October, 1891?

A. There may be a slight difference; I don't remember.

X Q. 197. Are they substantially the same?

A. I should say so; but I don't remember.

X Q. 198. Does the red hand appear on the side of each of the drums, namely, the drums of Suter-Hartmann & Rahtjen's Compositions Company, Limited, and the complainant?

A. Yes.

X Q. 199. Have you a sample of the drums or packages containing Rahtjen's composition or paint as the same was put up by Suter-Hartmann & Rahtjen's Compositions Company, Limited, in October, 1891?

A. No.

53 X Q. 200. Have you any photographs, prints, or other representation of the marking used by Suter-Hartmann & Rahtjen's Compositions Company, Limited, on such drums in October, 1891?

A. Not that I know of.

Adjourned until Thursday, March 23d, 11 a. m.

NEW YORK, THURSDAY, *March* 23, 1899—11 a. m.

Met pursuant to adjournment.
Present: Counsel as before.

Cross-examination of Mr. PETERSON continued:

X Q. 201. Have you the samples of letter-heads, bill-heads and literature of complainant company asked for at the previous sitting, if so, will you produce them?

A. Yes, here they are. They are sample letter-head, sample bill-head, circular or list of some of the vessels coated with Rahtjen's composition in '96. Also a circular dated 1893.

Defendant's counsel offers in evidence the papers and documents referred to in the preceding answer, and they are respectively marked "Defendant's Exhibit Complainant's Bill-head," and "De-

fendant's Exhibit Complainant's Letter-head," "Defendant's Exhibit Complainant's List of Vessels Coated from July 1st, 1896, to December 31, 1896," "Defendant's Exhibit Complainant's Booklet, Dated New York, 1893."

X Q. 202. Since the last sitting have you examined your records and have you found any information bearing upon bids submitted by you for the painting of the El Callao in 1889 or 1890?

A. No, but I did find later on that the El Callao, the Rhine, Dorian, Panama, Ciudad Condal, Mexico and Habana were coated
54 with Rahtjen's composition. I will give you the dates: El Callao, Sept., 1893: Rhine, Dec., '94; Dorian, Aug., '90; Panama, March, '92; Ciudad Condal, March, '92; Mexico, April, '92; Habana, Aug. 92; also did some inside work, painting, on the Panama, May, 1892, showing they must have thought the Rahtjen's composition pretty good.

Defendant's counsel objects to the answer in so far as it is not responsive to the question.

X Q. 203. Having refreshed your memory by an examination of the records or otherwise, are you able to state any instances where you came into competition with the defendant or John A. Donald & Co., for the sale of Rahtjen's paint or composition or the painting of ships therewith, prior to the organization of the complainant company in October, 1891?

A. No.

X Q. 204. Having refreshed your memory by an examination of the records of the complainant company since October, 1891, are you able to state any instances where you have come into competition with the defendant or John A. Donald & Co. in the sale of Rahtjen's paint or composition, or for the coating of ships or any kind therewith, except the two Government contracts of which you have spoken, in 1896, and June, 1898, respectively, or any other contracts with the Government?

A. I have been in competition with Mr. John A. Donald but never understood it was anything else that he represented except "International" and never with the Rahtjen's composition, to my knowledge, excepting in the case of Government contracts which I have testified to before.

X Q. 205. Do you swear positively that until the competition for the Government contracts alluded to, namely in 1896 and 1898, you had no knowledge of the fact that the defendant company was
55 advertising for sale and offering for sale and actually selling in competition with you a Rahtjen's paint or composition?

A. I have seen some of their printed matter, but I have never, to my knowledge, entered into competition with Mr. Donald for the Rahtjen's composition.

X Q. 206. You are positive on this point?

A. I just said so.

X Q. 207. When and where did you first see the advertisements of the defendant company to which you have just referred?

A. I don't remember.
X Q. 208. State your best recollection.
A. Well, about '93, I should say.
X Q. 209. Where did you see them—in what papers?
A. I think it was the Maritime Register.
X Q. 210. Anywhere else?
A. Not to my knowledge.
X Q. 211. What did these advertisements contain?
A. So long ago I can't remember.
X Q. 212. Did they offer for sale the Rahtjen's paint or composition, or did they contain the word Rahtjen's in any form?
A. It contained the word Rahtjen's, but what else I can't say; I don't remember.
X Q. 213. Notwithstanding they contained the word Rahtjen which you say you claim to be exclusively the property of the complainant, you paid no particular attention to the advertisement?
A. I may have paid attention to it but I believe I testified before that as long as we found it was doing us no injury and as we were not cognizant of the fact they had offered it for sale, we let the matter rest at the time.
X Q. 214. You had no objection then to the defendant using your alleged trade-mark so long as you thought it was not succeeding in making sale of any of its goods?
A. Oh, yes; we had objections, and I was only waiting a chance and an opportunity to stop the defendant from using the name.
X Q. 215. Why did you wait for five years or more before
56 making the attempt to prevent the defendant from using the alleged name or trade-mark?
A. I have answered that question before.
X Q. 216. Will you kindly answer it again?
A. We were waiting a good opportunity.
X Q. 217. What do you mean by that?
A. Well, the gathering of proofs.
X Q. 218. What kind of proofs?
A. Well, I did—legal proofs.
X Q. 219. Please state the nature of the legal proofs you were trying to gather during all this time?
A. Well, I am not a lawyer and not versed in law.
X Q. 220. If you do not know what legal proofs were, how could you have been endeavoring to collect them?
A. By conferring with my counsel.
X Q. 221. After conferring with your counsel, did you not know what kind of legal proofs you should endeavor to get?
A. Yes.
X Q. 222. Please state what kind of proof this was?
A. By the defendant offering to sell Rahtjen's composition.
X Q. 223. Do you regard an advertisement by a competitor in a public newspaper offering for sale Rahtjen's composition or paint, as not being an offer to sell such paints?

Question objected to by counsel for complainant because it assumes

that the advertisement which the witness may have seen did offer to sell Rahtjen's composition, and further, because it calls for a conclusion of law from the witness, and therefore is competent, irrelevant and immaterial.

A. I am not competent to judge that.

X Q. 224. So that from 1893, to June, 1898, when the defendant was a successful bidder for the Government contract, you paid no attention to the defendant's use of the word Rahtjen's in advertisements to which you have referred and you made no endeavor to purchase a sample of the paints or compositions which it was offering for sale under the name of Rahtjen's, and you made no protest against its use of the word Rahtjen's, or of the alleged trade-mark "Rahtjen's composition," until after the letting of the Government contract in June, 1898?

57

Objected to because it assumes what has not been testified to, that any such advertisement made an offer to sell Rahtjen's composition in the sense in which the witness has used the term, it simply having appeared by his prior testimony that he recollected the use of the word Rahtjen's, but nothing further as to the manner of its use.

A. I never testified that I saw the advertisement "Rahtjen's composition."

Adjourned for luncheon at 1.30 p. m.

X Q. 225. Wasn't it your impression or belief in 1893, that the defendant was selling or endeavoring to sell an alleged Rahtjen's paint or composition?

A. I had no actual proof.

X Q. 226. What was your belief?

A. Well, it was so long ago I couldn't say what my belief was at that time.

X Q. 227. Were there any firms or persons other than the defendant selling or offering to sell in 1893, or prior thereto a so-called "Rahtjen's paint or composition"?

A. To my recollection there was a man by the name of Furlong who, I understood was offering Rahtjen's composition. I called upon him, but did not see him, and as far as I recollect I left word for him that if he attempted to sell Rahtjen's composition I would proceed against him, and I heard rumors from abroad and from our agents in this country that Rahtjen's paint was offered in the market; therefore we sent out a warning, warning the public against any spurious paint—Rahtjen's paint—which might be offered.

58

X Q. 228. Did you know of any other firm, person or corporation than Furlong who was offering for sale or selling in 1893, or prior thereto, Rahtjen's paint or composition?

A. Not, except in that single instance which I testified to in regard to the advertisement of the defendant.

X Q. 229. What was the name of this man Furlong, to whom you have alluded, and where was he doing business?

A. His name was Furlong, is all I remember; his place of business was in Broad street.

X Q. 230. What was his business?

A. I don't know.

X Q. 231. Whose Rahtjen's paint or composition was he selling?

A. I have a faint recollection that he was associated with John A. Donald.

X Q. 232. Is he still living?

A. I saw him about a year ago.

X Q. 233. Do you know his present address?

A. Captain of the steamer Catania.

X Q. 234. I asked whose Rahtjen's paint, or whose make of Rahtjen's paint. Furlong was selling, but you did not answer. Please state what make of paint it was?

A. I suppose it was a spurious Rahtjen's.

X Q. 235. By whom made or manufactured?

A. I could not tell you.

X Q. 236. Do you mean you once knew but have forgotten?

A. I don't think I know any more than what I have testified to.

X Q. 237. You say you don't remember whose make of paint it was; do you mean by that that you did know at one time but have since forgotten?

A. No. I don't think I ever heard at the time more than Rahtjen's mentioned, to my recollection.

59 X Q. 238. You say that you understood that Furlong was connected with John A. Donald in the sale of Rahtjen's paint?

A. I said I had a faint recollection that he was connected with John A. Donald.

X Q. 239. And knowing that John A. Donald was selling the defendant company paint, didn't you know at the time or believe, and do you not now believe, that any Rahtjen's paint offered for sale by Furlong, or sold by him, was made by the defendant company?

A. All that I believe is that any Rahtjen's paint offered outside of our Rahtjen's paint is a spurious article.

X Q. 240. Will you now please answer the question?

Counsel for complainant objects to this and kindred questions in which it is sought to be represented that the witness knew that any of the parties named was actually selling such goods, or that they were in fact actually selling the same, there being no evidence to justify such language in the question.

A. I have no legal knowledge whatever that they ever sold any Rahtjen's paint. I can't say what my belief was then.

X Q. 241. Did not persons, firms or corporations other than the complainant and defendant, make and sell a composition or paint for ships' bottom- under the name of Rahtjen's composition or paint, in 1893, and prior thereto?

A. Not to my knowledge.

X Q. 243. Did you never hear from your correspondents abroad or your predecessors in business or your agents in this country, that

other firms, persons or corporations were offering for sale a Rahtjen's paint or composition in 1893, or prior thereto?

A. Prior thereto, not to my knowledge, but in 1893, which I have testified to before, I believe, we issued this general warning.

60 X Q. 244. What firms, persons, or corporations did you refer to, or have in your mind, when you issued the circular dated, New York, 1893, and marked, "Defendant's Exhibit Complainant's Booklet, etc.," when you used the following language:

"Unscrupulous competitors are endeavoring to place upon the market a so-called Rahtjen's paint, but only the genuine (Hartmann's manufacture) Rahtjen's compositions are branded with the red hand."

A. Well, it is a general warning sent out to every one; no one in particular.

X Q. 245. Didn't you have in mind the defendant in this case?

A. We had in mind every one who attempted to palm off a spurious article on the market.

X Q. 246. Please give the names of those persons, firms or corporations to whom you had reference in the circular in question?

A. I said no one in particular; but the defendant one, and Mr. Furlong the other, and in general warning to the public.

X Q. 247. Did you know of any other?

A. No, sir.

X Q. 248. How many persons, firms or corporations other than the complainant and defendant, are now making and selling a composition or paint for ships' bottoms under the name Rahtjen, or Rahtjen's paint or Rahtjen's composition?

A. The Suter-Hartmann & Rahtjen's Compositions Company, Limited; the Rahtjen's in Hamburg. Other than these I know of none.

X Q. 249. Have you never learned of the following persons and firms as makers of Rahtjen's paint or composition, namely: Turner, Morrison & Co., of Liverpool and Calcutta; William Wright, of Antwerp; M. Holzapfel & Co., Newcastle-upon-Tyne; Dr. Pflug, of Kiehl, Germany, or any of them?

61 A. Not to my knowledge. In regard to Dr. Pflug, I know that he does not advertise Rahtjen's composition, as I have his—corresponded with him.

X Q. 250. Is not the name of the Rahtjen who manufactures paint in Hamburg John Rahtjen?

A. I believe it is, sir.

X Q. 251. Is there not a Heinrich Rahtjen, of Bremerhaven, Germany, who manufactures and sells Rahtjen's paint or composition?

A. I believe there is: they are both stockholders in our company—John and Henry Rahtjen.

X Q. 252. Did you never see or read a copy of the English patent No. 3920, dated November —, 1873, granted to Heinrich Rahtjen for a preservative composition for ships' bottoms?

Question objected to as incompetent, immaterial and irrelevant.

A. I have seen such a copy—simply glanced over it within the last two or three months.

X Q. 253. Is not the preparation as now made and sold by the complainant substantially the same as the composition described in the said letters patent?

Question objected to as incompetent and immaterial.

A. I don't know.

X Q. 254. Do you know the ingredients that compose the Rahtjen's paint or composition sold by the complainant?

Question objected to as incompetent, being immaterial to the issue.

A. No.

X Q. 255. Do you claim that the words "Rahtjen's composition" have never been applied by complainant or its predecessors in business to any article made under a patent or according to a patented formula?

A. I don't know.

62 X Q. 256. Up to what time did the complainant's predecessors put up the Rahtjen's composition in wooden casks or barrels?

Objected to by counsel for complainant as assuming as a fact what has not been shown in evidence, namely, that Rahtjen's compositions were ever put up by either the complainant or its predecessors in anything except sheet-metal drums.

A. They might have put them up but not to my knowledge. All packages that I have handled or ever seen have been sheet-metal drums.

X Q. 257. Did not Hartmann, Le Doux & Maecker, whom you have testified were the agents in this country for Rahtjen's paint manufactured by the predecessors of the complainant, sell a Rahtjen's paint or composition put up in wooden casks or barrels?

A. Not to my knowledge.

X Q. 258. Did they sell any Rahtjen's paint or composition put up in wooden casks or barrels?

A. Not to my knowledge.

X Q. 259. Did they sell any other paint than Rahtjen's paint or composition?

A. Not to my knowledge.

X Q. 260. Did Suter-Hartmann & Co. ever sell any Rahtjen's paint or composition put up in wooden casks or barrels?

A. Not during the time I have known them have I ever seen it so put up. We have paste which we now import—the base of our composition, which is imported in barrels.

X Q. 261. Did you never learn that Suter-Hartmann & Co. at one time put up the Rahtjen's paint or composition in wooden casks or drums?

A. Not to my knowledge.

X Q. 262. Did you ever learn that any of the predecessors of the complainant company ever at any time put up the Rahtjen's paint or composition in wooden casks, wooden drums or barrels?

A. Not to my knowledge.

63 X Q. 263. You were asked in Q. 90 of the cross-examination if you had any books or data which would enable you to fix the date when you first bought the Rahtjen's composition; have you examined your books and papers and are you now prepared to answer the question?

A. I have examined my books, but I found I haven't any record of it there, but I have a paper here which I got from the archives of the French consulate, of which I am agent; at the time the French yacht Nubienne came here to the port of New York in July, 1884, in proceeding through Hell Gate she ran on the rocks, necessitating her to dry dock for repairs. The French consulate referred the owner to me in regard to arranging for repairs and survey; the surveyors ordered the repairs done and also advised to paint the bottom, and the owner requested me to get somebody to advise the best paint to apply to the bottom. I recommended Mr. Maecker as agent for the Rahtjen's composition, and the owner requested me to contract with him for the same, which I did, and the bottom was coated with Rahtjen's composition. Early in 1886, the French steamer Dupuy De Lome arrived here in distress, and dry-docked for repairs. I was present when the captain of the steamer contracted with Mr. Maecker for the coating of the bottom with Rahtjen's composition.

By consent of counsel, a copy of the letter or paper from the archives of the French consulate referred to in the preceding answer, is inserted in the record with the same force and effect *of* if the original was produced.

"NEW YORK, *July* 10, 1884.

Mr. A. Waldejo, chancellr. du consulate, general, &c., France.

64 DEAR FRIEND: Will you be good enough and notify the two surveyors from the French transatlantic steamer that the Nubienne will be on the sectional dock foot of Rutgers street, East river, and ready for survey at 1 o'clock this day. Lloyd's agent is John Roberts, No. 15 State street. Please notify him to be there also; that will be all right.

Respectfully yours, OTTO L. PETERSEN.

N. B.—Will see you later."

X Q. 264. You have testified that your business in 1891 and 1892, was about $70,000 per year. Was this gross or net?

A. Gross.

X Q. 265. What did this business include besides the sale of Rahtjen's paint?

A. Labor and dry-dock dues.

X Q. 265. Anything else?

A. Well, other paints that we manufactured.

X Q. 267. What proportion of your business is represented by sales of Rahtjen's paint or composition?

A. Well, that is pretty hard—I couldn't tell that offhand.

X Q. 266. Will you investigate and make answer at the next sitting?

A. If my counsel so advises.

X Q. 267. You have also testified that your business has trebled since that time. State the gross and net results of your business for the calendar year ending December 31, 1897?

Counsel for complainant instructs the witness that if the statement called for would be a disclosure in any way of trade secrets or unjustifiable as affecting the interests of the complainant company, he may for such reason, either decline to furnish the statement, or may properly limit it accordingly.

65 A. I cannot answer now, but will if counsel so advises.

Q. 268. And will you also state the gross and net results of your business for calendar year ending December 31, 1898?

Same instruction by counsel and same answer by witness.

X Q. 269. Please also state the gross and net results of your business for the six months ending 31st December, 1897, and the six months ending December 31, 1898.

Adjourned until March 24, 1899, 10.30 a. m.

MARCH 24, 1899—10.30 a. m.

Parties appeared pursuant to adjournment.
Present: Counsel as before.

Cross-examination of Mr. PETERSEN continued:

X Q. 270. Are you now prepared to answer the question in relation to the earnings of the defendant company as submitted to you yesterday?

A. Yes, if my counsel so advises.

Counsel for complainant advises the witness to answer the questions of the counsel for the defendant as far as pertains to the gross business of the complainant company, but that he need not make any statement regarding the profits of its business if such statement would be, in his judgment, unwise or detrimental to the business of the company.

Defendant's counsel objects to so much of the foregoing instruction of counsel to the witness as relates to the profits of the business, on the ground that the same are matters of proper cross-examination.

66 (Witness continues:) The first year's gross business was $71,400, that is, from November, 1891, to December 31, 1892. The proportional amount of Rahtjen's composition was 90 % gross business in 1897, $128,300; gross business in 1898, $181,500; proportionate amount of business with the Rahtjen's composition that year, 80 %; gross business the last six months of 1897, $66,300; gross business last six months of 1898, $106,000. I prefer not to disclose the profits of the company. I have no right to do that.

X Q. 271. Do you refuse to state the profits of the business during the periods referred to in your preceding answer?

A. I would prefer to consult my counsel.

X Q. 272. Will you kindly consult counsel and then state whether or not you will give the profits of the business?

A. I am advised by my counsel that this matter is not material to the case, and as disclosing the profits of my company might be detrimental to me with my competitor, and as I am not compelled to answer this question, I therefore decline to answer.

Defendant's counsel renews the objection and protests against the refusal of the witness to answer the question.

X Q. 273. You have referred in your direct examination to the loss of certain Government contracts since June, 1898, state specifically what Government contracts these were.

A. As far as I remember they were the navy yard at Portsmouth, New Hampshire.

X Q. 274. Were there any others?

A. At Boston also, I believe.

X Q. 275. Any others?

A. I don't recall now; I can't recollect any others.

X Q. 276. How many gallons of Rahtjen's paint were involved in the so-called Portsmouth, N. H., contract?

A. I don't remember.

67 X Q. 277. Did you submit a bid for this contract?

A. I think I did.

X Q. 278. Please produce a copy of that bid?

A. I have no copy of that bid, to my knowledge.

X Q. 279. Please examine the records of your company and state how many gallons of Rahtjen's paint or composition were involved in the so-called Portsmouth contract, for which you bid, and the price at which you proposed to furnish the same?

A. To my knowledge there is no record of that. The price I can give you: $3 for the No. 1 anti-corrosive and $4.50 for our No. 3 anti-fouling, per gallon, our regular price to the Government.

X Q. 280. How many gallons of Rahtjen's composition, or paint, were involved in the so-called Boston contract, and at what price did you propose to furnish the same?

A. It is impossible for me to tell the number of gallons, but the price would be the same, $3 and $4.50 per gallon.

X Q. 281. Does not your company keep records or memoranda of some kind, of bids or proposals or tenders of this character, made by it?

A. No, because the original blanks are filled in by us and returned to the Government. The only thing we have are the requisitions, which we sometimes keep.

X Q. 282. How many gallons of Rahtjen's paint or composition were involved in the so-called contract of June, 1898, and at what price did you propose to furnish the same?

A. I don't remember, but it is on the record here. I can easily find that out; 2,500 gallons Rahtjen's No. 1, in 10½-gallon drums, $3 per gallon; 2,000 gallons Rahtjen's No. 3, $4.50 a gallon (after having examined the exhibit in evidence).

X Q. 283. If you had secured the contract of June, 1898, just referred to, what would have been your profit per gallon on each kind of paint, or Rahtjen's composition?

68 Counsel for complainant advises the witness as heretofore, that it is not material what the profit of such sale would have been to the complainant, that he therefore cannot be compelled to answer the question, and may decline, therefore, to answer if he deems it detrimental to the business of complainant to make such disclosure to a competitor.

Defendant's counsel objects to the foregoing instruction of counsel to the witness on the same grounds heretofore stated.

A. I decline to answer for the reasons given heretofore.

Defendant's counsel objects to the refusal of the witness to answer.

X Q. 284. Do you know how much the profits per gallon of Rahtjen's paint or composition are to the complainant company at the prices named by you for the Government contract of June, 1898, namely: $3 per gallon for Rahtjen's No. 1 and $4.50 per gallon for Rahtjen's No. 3?

A. I never figured it out.

X Q. 285. Do you mean to say that you, as the president of the complainant company, do not know, when you submit bids for the furnishing or selling Rahtjen's composition or paint at $3 and $4.50 per gallon respectively, what margin of profit there is?

A. Oh, yes; I could easily tell that, but I said I had never figured it out.

X Q. 286. Then you do know it, but you decline to tell?

Complainant's counsel objects to this language of counsel for defendant in stating what the witness has not said, for the purpose evidently of confusing and endeavoring to entangle the witness.

A. I have not declined to tell.

69 X Q. 287. You could figure up and ascertain the profits on the Rahtjen's composition at the prices named, could you not?

A. I suppose so, if I so wished.

X Q. 288. Will you please figure up the profits per gallon of Rahtjen's paint on the Government contract of June, 1898, and state what they would have been per gallon at the prices named to the Government?

Objected to by counsel for complainant as incompetent, irrelevant and immaterial, and the witness is advised as before that he may decline to answer or make such disclosure for the reasons heretofore stated.

Defendant's counsel objects to the instructions to the witness on the grounds heretofore stated.

A. I decline to answer on the grounds heretofore stated.

Defendant's counsel objects to the witness's refusal to answer.

X Q. 289. Asking you broadly, am I to understand from your testimony that you decline to state what the profits are per gallon on the sale of Rahtjen's composition or paint at $3 and $4.50 per gallons respectively? A. I do not refer to any special contract in this inquiry, but to the sale to any one of Rahtgen's composition at such prices.

A. Yes, I refuse.

Same objection by counsel for defendant.

Defendant's counsel objects to the evidence so far introduced on the ground that there is failure of proof of title to the trade-mark in question, it appearing that the complainant corporation
70 was not the first to adopt the trade-mark in question, but is alleged to have derived its title through some written instrument, which has not been produced, from some foreign corporation. Unless this defect is remedied before the *prima facie* case is closed defendant's counsel will press said objection at the final hearing.

Cross-examination closed.

Adjourned until 2 p. m. for luncheon.

At 2 p. m. a further adjournment was ordered on motion of complainant's counsel, until Monday, March 27th, 1899, at 11 a. m.

NEW YORK, *March* 27, 1899.

Taking of further testimony adjourned by consent to Tuesday, March 28th, 1899, at 11 a. m.

NEW YORK, *March 28th*, 1899.

Taking of further testimony adjourned by consent to Thursday, March 30th, 1899, at 11 a. m.

NEW YORK, *March* 30, 1899—11 a. m.

Met pursuant to adjournment.

Redirect examination:

Counsel for complainant states that the reasons for the instructions given to witness in connection with X Q. 283 to 289 were,
71 first, that the information called for was immaterial and irrelevant at the present stage of the case, being material and relevant only in the event of an accounting as prayed for in the bill; and second, that it pertains to the private business of the complainant, and is not necessary to the making of a *prima facie* case under the bill, or to the establishment of any defense set up in the answer.

R. D. Q. 290. Referring to Q. 283 to 289, in cross-examination, in which you were asked as to the amount of profits to the complainant for the sale of Rahtjen's composition, has that been a profitable business for the complainant?

A. Very profitable.

R. D. Q. 291. Q. 190, cross-examination, is as follows: "But the contract with the Government" (referring to the contract of June, 1898), "was the only injury you have received from competition with

the defendant, was it?" To which you answered, "As regarding the sale of Rahtjen's paint." Noting the purport of this question, do you wish to qualify your answer?

A. I would like to alter it—that was the first instance to my knowledge.

R. D. Q. 292. Q. 196 of cross-examination is as follows: "Q. In other respects, is the marking of the drums of the complainant company the same as the drums of the Suter-Hartmann & Rahtjen's Compositions Company were in October, 1891?" To which you answered, "There may be a slight difference. I don't remember." Do you wish to qualify or add to this answer?

A. Instead of the Suter-Hartmann & Rahtjen's Composition Company, Limited, they were marked with the Rahtjen's American Composition Company. In other respects they are the same.

R. D. Q. 293. In your direct examination, Q. 43, you were asked, "State whether or not since June, 1898, the United
72 States Government has called for bids and awarded contracts for Rahtjen's compositions," to which you answered "Yes." In cross-examination you were asked by Q. 273: "You have referred in your direct examination to the loss of certain Government contracts since June, 1898. State specifically what Government contracts these were. A. As far as I remember, they were the navy yard at Portsmouth, New Hampshire. X Q. 274. Were there any others? A. At Boston, also, I believe. X Q. 275. Any others? A. I don't recall now; I can't recollect any others." Have you refreshed your recollection and can you answer the questions quoted more fully or specifically?

A. I have refreshed my recollection—there was one at the Mare Island navy yard; as far as I recollect the date, it was in December, 1898.

R. D. Q. 294. Any others?

—. None that I recollect.

R. D. Q. 295. State whether a contract for Rahtjen's compositions has been awarded on the bids of December last at Mare Island navy yard, and if so to whom?

Objected to by defendant's counsel as calling for secondary evidence.

A. It has not been awarded to any one.

R. D. Q. 296. You stated, in your answers to the questions above quoted, that contracts had been awarded both at Portsmouth, N. H., and Boston. State how many of these there have been, and, as near as you can, the dates on which they were awarded.

A. Two or three; the only date I recollect, to the best of my knowledge, is August or September at Boston. At Portsmouth, N. H., I don't recollect the date.

R. D. Q. 297. In the regular course of business of the complainant company, how is Rahtjen's composition designated in Government requisitions or orders by private parties upon your company,
73 and in the bills rendered by your company in filling such orders?

Objected to by defendant's counsel as calling for secondary evidence.

A. Usually as "Rahtjen's compositions."

R. D. Q. 298. Have you samples of such requisitions, orders and press copies of bills, and if so will you produce them?

A. I have, and produce them.

Complainant's counsel offers the same in evidence, and they are received and marked respectively, Complainant's Exhibit Telegraphic Order of April 27, 1892; Complainant's Exhibit Press Copy of Bill of April 27, 1892; Complainant's Exhibit Press Copy of Bill of May 2, 1892, and Complainant's Exhibit U. S. Government Requisition of June 20, 1893.

R. D. Q. 299. What were the markings painted or stencilled upon the drums of paint bought August 5th, 1898, from the defendant to which you testified in answer to direct Q. 46?

Objected to by defendant's counsel as calling for secondary evidence. The drums themselves which are in the possession of complainant being the best evidence.

A. This is a copy:

(Mark on capsules)
"Holzapfel's
American manufacture.

I 8124

74

trade (Propeller) mark"

(Mark on drum)
"Holzapfel's
American improved
Rahtjen's
Priming composition.
Stir well before using.
No. 1.

Registered

trade (Propeller) mark"

(Mark on capsules)
"Holzapfel's
American manufacture

III 8125

trade (Propeller) mark"

(Mark on drum)
Holzapfel's
American improved
Rahtjen's
Anti-fouling composition.
Stir well before using.
No. 3.

Registered

trade (Propeller) mark"

Counsel for defendant objects to the answer on the same grounds as to the question.

Complainant's counsel produces copy of the New York Maritime Register, dated June 8, 1898, and offers in evidence the advertisement of Holzapfel's Compositions Co., Limited, Manager John A. Donald, which appears on page 48 thereof, and the same is received in evidence and marked "Complainant's Exhibit Defendant's Advertisement."

R. D. Q. 300. In answer to Q. 22 of your direct examination, you stated that the complainant company's customers were the American Government and the largest steamship companies of the
75 world. Please state the names of some of these companies?

Defendant's counsel objects to the question as not proper redirect examination.

A. These are some of the companies:

Mallory line, Morgan line, American line, White Star line, Cunard line, Hamburg-American line, North German Lloyd, French line, Old Dominion line, Atlas line, Atlantic Transport line, Lamport & Holt, Thingvalla, Quebec S. S. Co., Panama R. R. & S. S. Co., Anchor line, Trinidad S. S. Co., Wilson line, Sanderson & Co., Miller, Bull & Knowlton, Maine S. S. Co., Arthur Sewall, Flint & Co.

R. D. Q. 301. What is Hartman's grey paint, which is referred to in Defendant's Exhibit "Complainant's Booklet" of 1893?

Objected to as immaterial and irrelevant.

A. The grey paint we buy is a paste or base form from the Suter-Hartmann & Rahtjen's Compositions Company, Limited, and compound-*it* here. And it is used for non-submerged surfaces. The inside of a vessel and the outside, but not the parts submerged in the water.

R. D. Q. 302. Do you import any materials or part of the Rahtjen's compositions, and if so what, and from whom?

Counsel for defendant objects to the question as not proper redirect examination.

Question withdrawn.

R. D. Q. 303. In answer to Q. 260 of the cross-examination,
76 you stated: "We have paste which we now import—the base of our composition, which is imported in barrels." What is the base which you referred to in that answer, and by whom is it manufactured?

A. The paste or base of the Rahtjen's composition we buy from the Suter-Hartmann & Rahtjen's Composition Company, Limited, and it is compounded here by the American company.

R. D. Q. 304. What do the words "Hartmann's manufacture" as used by the complainant company, as in some of its literature, which is in evidence introduced by the defendant, indicate?

A. Several years before the Suter-Hartmann & Rahtjen's Composition Company, Limited, was organized, the firm of Hartmann

Brothers had the exclusive right to manufacture the Rahtjen's compositions in England. The goods were marked with the words "Hartmann's manufacture." This was to distinguish them from the compositions manufactueed by the Rahtjen's in Germany. Then when the English company was formed, they acquired the manufacturing rights and marked their goods in the same way. As the American company buy the paste or base from the English company, its manufacture is also marked with the same words, "Hartmann's manufacture." These words are connected with a red hand; this is the symbol originally used by the Hartmann Brothers in connection with the words "Hartmann's manufacture." That is as near a history of the case as I can give.

Counsel for defendant objects to so much of the answer as pertains to alleged transfer of exclusive rights to make or use Rahtjen's compositions or trade-mark or trade-name, on the ground that it is secondary evidence.

R. D. Q. 305. Are the words "Hartmann's manufacture" with the symbol of a red hand used in connection with Rahtjen's compositions only or generally with the goods manufactured by the
77 complainant, including the grey paint to which you have previously testified?

A. No, they are used with our other manufactures, with the grey paint and others.

R. D. Q. 306. Have you any copies of the markings which the complainant ordinarily puts upon its drums of Rahtjen's compositions, made with the same stencils? If so, will you produce them?

Counsel for defendants objects to the question as calling for secondary evidence.

A. I have, and produce them.

Complainant's counsel offers said copies in evidence and same are received and marked respectively, "Complainant's Exhibit Original Stencil Copy of Markings on Complainant's Drums Containing Rahtjen's Composition No. I," and "Complainant's Exhibit Original Stencil Copy of Markings on Complainant's Drums Containing Rahtjen's Compositions No. III."

Defendant's counsel objects to the introduction in evidence of said exhibits on the ground that they are secondary evidence, and that the production of the drums themselves with the markings would be the best evidence.

Recross-examination:

R. X Q. 307. Since the close of the cross-examination and before the beginning of your redirect examination, did you have any consultation or interview with your counsel as to the testimony you had then given?

A. I have spoken to my counsel about several things but otherwise I don't remember every word.

Defendant's counsel objects to the communication between
78 the witness and counsel during adjournment as to the testimony previously given by the witness, and objects to the reception of testimony subsequently given by said witness.

R. X Q. 308. Do the Suter-Hartmann & Rathjen's Compositions Company, Limited, at present manufacture and sell the so-called Rahtjen composition?

A. Yes.

Recross-examination closed.

Redirect examination:

R. X Q. 309. Does the Suter-Hartmann & Rahtjen's Compositions Company, Limited, sell the paints known as Rahtjen's compositions in the United States?

A. No.

OTTO L. PETERSEN.

Complainant's counsel offer in evidence uncertified Patent Office printed copy of registered trade-mark "Rahtjen's composition" No. 1233 i, registered June 23, 1885, and the same is received in evidence and marked "Complainant's Exhibit Trade-mark Rahtjen's Composition." Also uncertified Patent Office printed copy of registered trade-mark of a symbol of an open hand, No. 17035, registered September 17, 1889, and the same is received in evidence and marked "Complainant's Exhibit Trade-mark of Open Hand."

Counsel for defendant objects to the offer or reception in evidence of the second alleged trade-mark above mentioned on the ground that the same is not pleaded or set up in the bill of complaint herein.

Complainant's *prima facie* case closed.

79 COMPLAINANT'S EXHIBIT PRESS COPY OF BILL OF MAY 2, 1892.

MAY 2ND, '2.

U. S. navy yard, Brooklyn, N. Y.

100 galls. No. 1 Rahtjen's compositions at $3.00..... 300 "
40 galls. No. 4 Rahtjen's compositions at $4.00..... 160 "

460 "

COMPLAINANT'S EXHIBIT TELEGRAPHIC ORDER OF APRIL 27, 1892.

The Western Union Telegraph Company.

Number.	Sent by—	Rec'd by—	5 paid.	Check.
B. 6. N. Y.	M.	K.		

APRIL 27, 1892.

Received at Produce Exchange, New York.
Dated New London, Conn., 27.

To Otto L. Petersen, 120, one twenty, Broad St., N. Y.:
Ship twelve gallons Rahtjen's composition.
DARROW & COMSTOCK.

COMPLAINANT'S EXHIBIT PRESS COPY OF BILL OF APRIL 27, 1892.

APRIL 27TH, '2.

Messrs. Darrow & Comstock, New London, Conn.

1 drum 10½ glls. No. 3 Rahtjen's compositions at $4.50..... $47.25
Less 15%..... 7.08

$40.07

80 COMPLAINANT'S EXHIBIT U. S. GOVERNMENT REQUISITION OF JUNE 30, 1893.

S. and A.)
Pay officers' form No. 104.)

U. S. navy office, Stewart building, 280 Broadway.

NEW YORK, *June* 20, 1893.

M. Rahtjen's Am. Comp. Co.:

Please furnish the navy yard, New York, for immediate use, subject to usual inspection at that yard, appropriation for — requisition No. 474, bureau of C. & R., to be delivered promptly in conformity with your proposal dated June 16.

Articles required.	Price.	Per—	Aggregate amount.
	Dollars. Cents.		
For U. S. S. "Bancroft:"			
31½ gallons of Rahtjen's anti-corrosive composition #1 for ships' bottoms.....	3.50	gal.	
21 gallons of Rahtjen's anti-fouling composition #3 for ships' bottoms.....	4.50	"	
To be delivered in cans of 10½ gallons.			
Total, $204.75.			
To be delivered if not already.			

Send duplicate bills to this office for my certificate, after which deliver them at the navy yard with the articles.

L. G. BILLINGS,
Pay Inspector, U. S. Navy.

81 COMPLAINANT'S EXHIBIT DEFENDANT'S BILL.

Welles building,
18 Broadway,

NEW YORK, *August 5th*, 1898.

Head office.
Quayside, Newcastle-on-Tyne.

Branches.
Cardiff,
43, Mount Stuart square;
Liverpool,
3, Chapel street;
Glasgow,
12 Waterloo street;
London,
57 Fenchurch street.

To Holzapfel's Compositions Company, Ltd., Dr.

Messrs. New York Lubricating Co.,
35 Water street, New York.

1898.		
Aug. 5.	To 1 cwt. Holzapfel's Rahtjen's composition No. 1...	825 00
	1 cwt. Holzapfel's Rahtjen's composition No. 3...	35 00
		$860 00

E. & O. E.

Paid
Aug. 5, 1898.
Holzapfel's Compositions
Co., L'd.

S. A. O. P.

(Here follow reproductions of originals marked pp. 82, 83, and 84.)

N. N. GENUINE RAHTJEN'S COMPOSITION TRADE (SYMBOL OF OPEN HAND) MARK

HARTMANNS

MANUFACTURE

PRIMING

FIRST COATING

RAHTJEN'S AMERICAN COMPOSITION COMPANY.

NEW-YORK

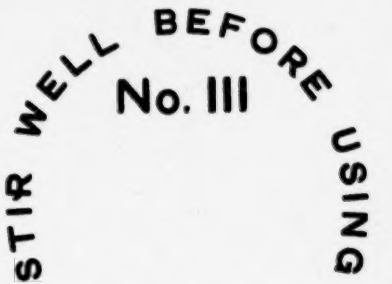
7140

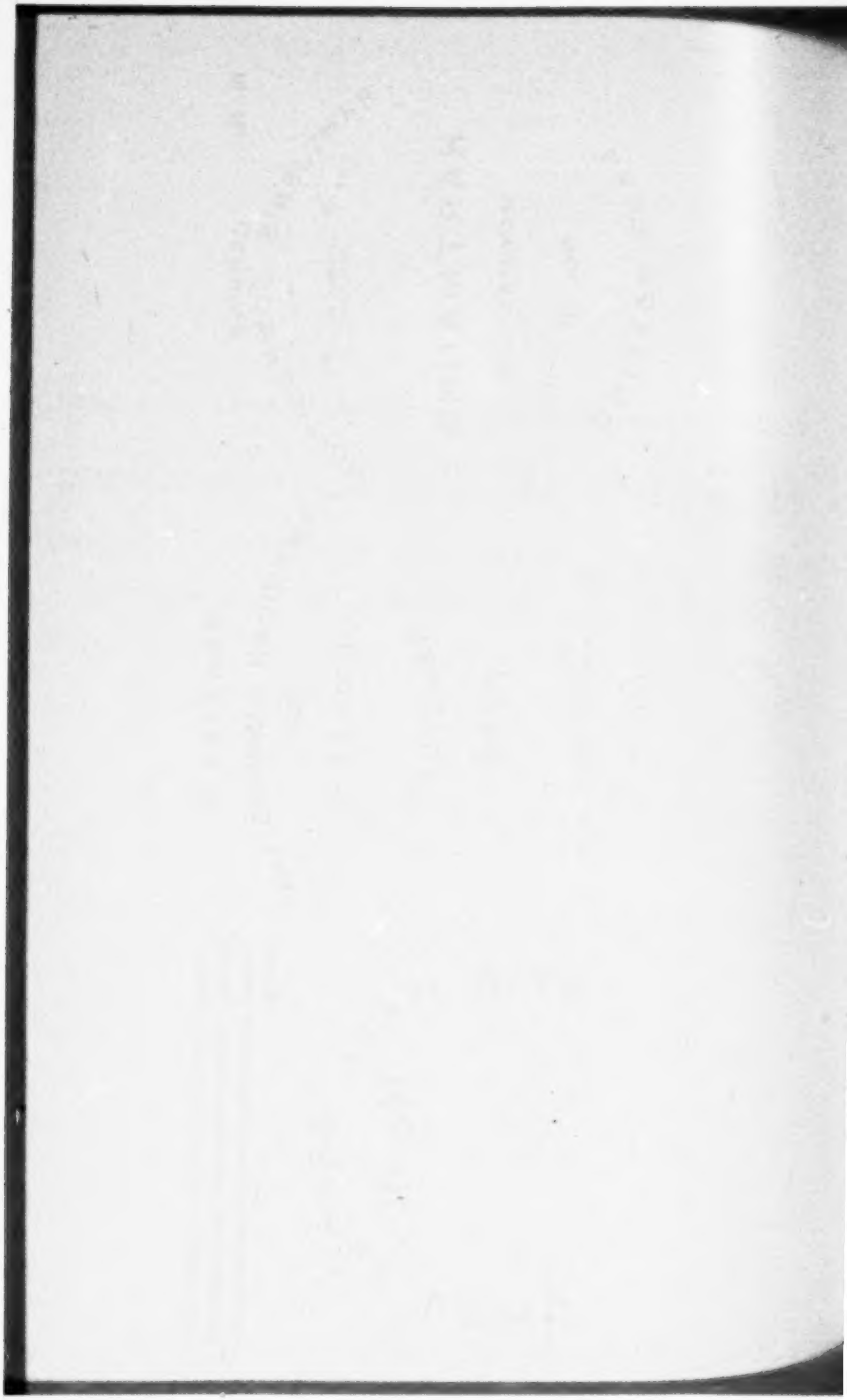
Complainant's Exhibit original stencil copy of markings on complainant's drums containing Rahtjen's Composition No. I.

STIR WELL BEFORE USING No. I

No. 267
Holzapfel's Co.
v.
Rahtjen's Co. } p. 82.

Complainant's Exhibit original stencil copy of markings on complainant's drums containing Rahtjen's Composition No. I.





Complainant's Exhibit Defendant's Advertisement.

Holzapfel's AMERICAN Compositions.

TRADE

MARK

Holzapfel's American Improved

RAHTJEN'S Composition.

Holzapfel's American International

Composition, &c.,

FOR SHIPS BOTTOMS.

HOLZAPFEL'S COMPOSITIONS CO., LTD.

Anticorrosive & Antifouling Composition Manufacturers,

Office, 18 Broadway, New York.

Factory: Elizabeth St., Brooklyn. Manager JOHN A. DONALD.

Cable Address, HOLZAPFEL, NEW YORK. Telephone, 2024 Broad.

No. 267
Holzapfel's Co. } p. 84
v.
Rahtjen's Co

85 Circuit Court of the United States for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant.
} In Equity.

Rebuttal proofs for final hearing taken on behalf of the complainant pursuant to stipulation heretofore entered into without further notice (such notice being waived) forthwith upon the conclusion of the defendant's proofs, at room 10, Cannon Street hotel, in the city of London, England, on this 25th day of August, 1899, commencing at 2.30 o'clock p. m.

Present: T. D. Merwin, Esq., of counsel for complainant, and R. B. McMaster, Esq., of counsel for defendant.

WILLIAM HARTMANN, a witness produced on behalf of complainant, being first duly sworn, deposes and says, in answer to questions propounded to him by Mr. Merwin:

Q. 1. What is your business and residence?

A. Merchant in London. Residence, Chilworth, Surrey.

Q. 2. State whether or not you were ever connected with the firm of Suter, Hartmann & Co.

A. Yes, I was.

Q. 3. In what capacity and for how long?

86 A. I was the founder of the firm of Suter, Hartmann & Co. in the beginning of the year 1871 up to the time of the formation of the company, Suter Hartmann & Rahtjen's Composition Company, Limited, constituted in the year 1888.

Q. 4. Were you then a partner in the firm of Suter Hartmann & Company during that entire period?

A. Yes.

Q. 5. What was the business of Suter Hartmann & Co.?

A. The sold consignees of Rahtjen's composition.

Q. 6. Sole consignees of what consignor?

A. Of John Rahtjen, Bremerhaven.

Q. 7. Do you know Mr. A. C. A. Holzapfel at one time agent of Suter Hartmann & Co.?

A. Yes.

Q. 8. Are you familiar with his handwriting and signature?

A. Yes, perfectly.

Q. 9. I hand to you two letters, one bearing date March the 20th, 1879, addressed to Suter Hartmann & Co., London, bearing the signature "A C. Holzapfel," the other dated November the 25th, 1881, addressed to the same firm and with the same signature. Will you examine the same and state what they are?

A. They are letters written by Mr. A. C. A. Holzapfel, the defendant, whose usual signature was "A. C. Holzapfel."

Counsel for complainant offers the letters in evidence, and the same are received and marked "Complainant's Exhibit- A 1 & 2" respectively.

Q. 10. What was the firm name under which Mr. A. C. Holzapfel first was engaged as agent for Suter Hartmann & Company?

A. I believe Hartmann & Holzapfel in Cardiff, and subsequently Hartmann & Co. in Newcastle.

87 Q. 11. I show to you two documents, one bearing date "Newcastle-on-Tyne, 23, 9, 76," addressed to Messrs. Hartmann & Co., Newcastle-on-Tyne, and bearing the signature of "George William Ward, marine surveyor;" another bearing date "North Shields, 7th August, 1877," addressed to Messrs. Hartmann & Co., Newcastle-on-Tyne, and bearing the signature "Thomas Farlan." Please examine these documents and state what they are.

A. They are testimonials relating to good results of the Rahtjen's composition on the steamer- "Said" and "Peer of the Realm."

Q. 12. State how they came into the possession of Suter Hartmann & Co. or of the company, Suter-Hartmann Rathjen's Composition Company, Limited?

A. They were sent up by the agents of Suter Hartmann & Co., Messrs. Hartmann & Co., Newcastle-on-Tyne, to Suter Hartmann & Co. as their principals.

Complainant's counsel offers the said documents in evidence, and the same are received and marked "Complainant's Exhibit B 1 and 2" respectively.

Defendant's counsel objects to the introduction of the said documents in evidence, on the ground that the same are secondary evidence, and incompetent and immaterial.

Q. 13. I show you two documents both bearing date May 6th, 1879, one addressed to Messrs. J. & E. Wilson, London, and the other witnesses to Messrs. Pembroke & Stringer, London, and both signed "A. C. Holzapfel." Please examine the same and state what they are.

A. They are tenders for coating ships by A. C. Holzapfel with Rahtjen's composition.

Complainant's counsel offers said documents in evidence, and the same are received and marked "Complainant's Exhibits C 1 and 2" respectively.

88 Q. 14. Have you any circulars of the firm of Hartmann & Co. who were formerly agents for Suter Hartmann & Co., and, if so, will you please produce them?

A. I have two here; one dated July 1st, 1877, and the other the 1st February, 1878.

Q. 15. How did these come into your possession or that of Suter Hartmann & Co., if you know?

A. I think they were sent to Suter Hartmann & Company by Hartmann & Co. as their principals.

Defendant's counsel objects to the answer as incompetent, irrelevant and immaterial.

Complainant's counsel offers the said documents in evidence, and the same are received and marked "Complainant's Exhibits D 1 and 2" respectively.

Defendant's counsel objects to the reception in evidence of the said documents on the ground stated in the objection to the preceding answer.

Q. 16. Have you any other circulars of, or pertaining to, the agency of Hartmann & Co.? If so, will you produce them?

A. I produce here a circular issued by John Hartmann & A. C. Holzapfel relating to the dissolving of partnership existing between these two partners.

Complainant's counsel offers the circular in evidence, and the same is received and marked "Complainant's Exhibit E."

Q. 17. Mr. A. C. Holzapfel in his deposition in this proceeding, in answer to question 57, speaks of your calling upon him in the spring of 1879, and then states as follows:

"When he first met me he handed me a paper from the high court of justice purporting to be an injunction restraining me from making any composition in imitation of their patent."

89 State whether or not you remember any such interview.

A. I do not remember such an interview, but I remember taking a writ issued by the high court of justice down with me to Newcastle in March, 1879, and serving it on Mr. A. C. Holzapfel.

Q. 18. Look at the paper which I now hand to you and state whether you have ever seen it before, and, if so, what it is.

A. That is the writ I have just spoken of.

Complainant's counsel offers the document in question in evidence and the same is received and marked "Complainant's Exhibit F."

Complainant's counsel offers in evidence uncertified copy of the award in the suit of Suter Hartmann & Co. *vs.* Holzapfel, 1881, S. No. 5396, signed "William Lowrie," and the same is received in evidence and marked "Complainant's Exhibit G."

Q. 19. State whether or not you have in your possession any testimonials furnished to Suter Hartmann & Co. with reference to the use of Rahtjen's composition in Germany, or upon vessels belonging to German owners, and if so, will you produce them?

Objected to by defendant's counsel as being immaterial, irrelevant, and incompetent.

A. I produce them herewith, they being dated 3d February, 1871; 20th January, 1871; 21st July, 1873; 3d March, 1875, and November, 1876.

Complainant's counsel offers the said documents in evidence, and the same are received and marked "Complainant's Exhibits H 1, 2, 3, 4, and 5," respectively.

Complainant's counsel further states that he will before
90 closing the case submit translations of such of the said documents as are in German, to be appended thereto and made part of the record.

Defendant's counsel objects to the reception in evidence of the so-called testimonials on the ground that the same are incompetent, irrelevant, and immaterial; and furthermore on the ground that such evidence is secondary evidence of the alleged facts purported to be proved by the said testimonials.

Q. 20. State whether or not the testimonials which you have just produced were received and used by the firm of Suter Hartmann & Co. in the regular course of its business?

Objected to as irrelevant, incompetent and immaterial and as leading.

A. They were.

Q. 21. By what name were the compositions for which Suter Hartmann & Co. were sole consignees as you have testified, known to, and ordered, and bought by, the trade?

A. "Rahtjen's composition," sometimes "Rahtjen's patent composition," but always "Rahtjen's."

Q. 22. What was the usual term by which the compositions were generally known?

A. "Rahtjen's compositions."

Q. 23. State whether or not you have in your possession any letters received in due course of business by Suter Hartmann & Co. in the years 1871 and 1872, relating to the compositions in which the said firm was trading, and, if so, will you produce the same?

A. I herewith produce letters from the Royal Mail Steam Packet Company, dated 25th August, 1871, and 6th May, 1872, and from the Peninsular & Oriental Steam Navigation Co., dated 29th September, 1871, and 3d October, 1871.

91 Q. 24. How were these letters received by Suter Hartmann & Co., if you know?

A. In the ordinary course of business?

Complainant's counsel offers the said letters in evidence, and the same are received and marked "Complainant's Exhibit J, 1, 2, 3 and 4," respectively.

Q. 25. State whether or not you have in your possession any orders for "Rahtjen's composition" received by Suter Hartmann & Co., and, if so, will you produce samples of the same?

A. Yes; I herewith produce two orders from the Royal Mail Steam Packet Company, dated 5th July, 1872, and the 23d of September, 1872.

Q. 26. How were these orders received?

A. In the due course of business.

Complainant's counsel offers the said documents in evidence, and the same are received and marked "Complainant's Exhibit K, 1 and 2," respectively.

Q. 27. State whether or not you have other similar orders.

Objected to as immaterial and irrelevant, and as calling for secondary evidence.

A. I have.

Q. 28. State whether or not the London office of Suter Hartmann & Rahtjen's Composition Company, Limited, has all of the books, accounts, papers, etc., of the Liverpool and London business of Suter Hartmann & Co. for the years 1871, 1872 and 1873.

A. Yes, to the best of my belief.

Q. 29. State whether or not you have had prepared from the invoice books of Suter Hartmann & Co. for the years 1871 and 1872 now in the possession of Suter Hartmann & Rahtjen's Composition Company, Limited, copies of invoices of the composition traded in by that firm.

92 A. Yes.

Q. 30. Will you produce the same?

A. I herewith produce them.

Q. 31. State whether or not you have verified these copies from the original letter-press books.

A. I have verified them with the invoice books.

Complainant's counsel offers the said documents in evidence, and they are received and marked "Complainant's Exhibit L, 1, 2, 3 and 4," respectively.

Q. 32. I show you a document; will you please examine it and state what it is?

A. It is a letter from the admiralty addressed to Suter Hartmann & Co. on the 18th November, 1873.

Q. 33. State how this was received by Suter Hartmann & Co., whether in the usual course of business or not.

A. It was in the usual course of business.

Complainant's counsel offers the said document in evidence, and the same is received and marked "Complainant's Exhibit M."

Defendant's counsel objects to the reception in evidence of the said letter unless the letter to which this is a reply is also introduced.

Q. 34. I show you another document; will you examine the same and state what it is?

A. It is a testimonial by Strong, Reid & Page dated Liverpool, January 24th, 1876.

Q. 35. How was this document received?

A. Addressed to Suter Hartmann & Co., Liverpool, giving a testimonial of good results of the Rahtjen's patent composition.

Answer objected to as incompetent and as secondary evidence.

Q. 36. State how this letter was received by Suter Hartmann & Co.

93 A. It was received in due course of business.

Complainant's counsel offers the said document in evidence, and the same is received and marked "Complainant's Exhibit N."

The reception in evidence of the said document is objected to by defendant's counsel as incompetent, and as secondary evidence of the facts attempted to be proved by it.

Q. 37. State whether or not during the year 1871, 1872 or 1873 your firm of Suter Hartmann & Co. advertised Rahtjen's composition by way of signs, show-cards, or similar devices, and, if so, can and will you produce any samples of the same?

A. I herewith produce a show-card showing a ship in dry dock, that was used for advertising purposes on a large scale all over England, and different ports of dry docking. The show-card was made in the early part of 1873.

Q. 38. State, if you know, about how many of these show-cards were made and used by Suter Hartmann & Co.?

A. I think about 1,000.

Q. 39. During what period of time were they so used?

A. For three or four years, until a new show-card showing the "Great Eastern" was produced, I think about the year 1876.

Q. 40. What is the name partly shown or disclosed at the bottom of the card, over which a slip has been pasted?

A. "56 Basinghall street."

Q. 41. What was that?

A. That was our first address, where our firm, Suter Hartmann & Co. was established.

Q. 42. What was imprinted upon the slip pasted over this address?

A. "18 Billiter street," that is the present address of Suter Hartmann & Rahtjen's Composition Company.

94 Q. 43. Was the last-named place the address also of Suter Hartmann & Co.?

A. Yes.

Q. 44. From about what date?

A. From about 1874 to 1888, when Suter Hartmann & Rahtjen's Composition Company was constituted.

Complainant's counsel offers the show-card in evidence, and the same is received and marked "Complainant's Exhibit O."

Q. 45. I notice upon the show-card in evidence the names of various steamship companies. What are these?

A. They were clients who were supplied with Rahtjen's composition for their ships.

Q. 46. During what period, or prior to what date had they been thus supplied?

A. Prior to the date when the show-card was made in 1873.

Q. 47. State whether you have had copied from the books of Suter Hartmann & Co. now in the possession of the Suter Hartmann and Rahtjen's Composition Company, Limited, a statement showing the sales and shipments of Rahtjen's compositions by Suter Hartmann & Co. to their agents in the United States, from the year 1879 to 1884 inclusive; and, if so, will you produce the same?

A. I herewith produce the same.

Q. 48. State whether or not you have verified these from the original entries in the books of account?

A. I have.

Complainant's counsel offers said statement in evidence, and the same is received and marked "Complainant's Exhibit P."

(Adjourned to August 28th at 11.30 o'clock a. m. at the same place.)

95 The examination of the witness William Hartmann having been suspended for the purpose of producing and examining another witness (John Rahtjen), the examination of Mr. Hartmann was resumed on the 30th August, 1899, at 2.30 at the same place.

Q. 49. State whether or not you have had careful search made among the papers of Suter Hartmann & Co., now in the possession of Suter Hartmann & Rahtjen's Composition Co., for the letter or a copy of the same referred to in the admiralty letter in evidence as "Complainant's Exhibit M," and, if so, with what result?

A. I have had a search made and no copy of that letter has been found.

Q. 50. I show you "Complainant's Exhibit N," being testimonial of Strong, Reid and Page. State whether or not to your knowledge the steamers of that firm were coated with Rahtjen's composition from your firm prior to the date of that letter.

Defendant's counsel objects to the said alleged testimonial and all examination in regard to it upon the same ground as stated in reference to the offer of the said testimonial in evidence, viz., that it is secondary evidence of the matters therein and incompetent.

A. They were.

Q. 51. I show you the letters constituting "Complainant's Exhibit U," being letters identified by the witness John Rahtjen as bearing the signature of Henry Gelien and addressed to your company. State, if you know, how and when those letters were received by your firm.

A. These letters dated 14th July, 1874, and 27th February, 1875, written or signed by Henry Gelien to my firm, Suter Hartmann & Co., were received in the ordinary course of business.

96 Q. 52. I show you "Complainant's Exhibit T," being a circular of Hartmann, Le Doux & Maecker, dated April 23d, 1878. State whether or not there is upon that circular a fac-simile of your signature of that firm's name.

A. Yes.

Q. 53. State whether or not that circular was issued with your knowledge or consent.

A. It was.

Q. 54. I show you "Complainant's Exhibit V." Please examine the same and state what it is.

A. It is a label of "directions for use," that we used from the very onset of our career as sole consignees for Rahtjen's patent composition. It bears my own signature, "None genuine without this signature, 'Suter Hartmann & Co.'"

Q. 55. I notice upon this, one of the addresses of the firm is "18 Billiter street." State whether or not before your firm was domiciled there you had any similar labels to these for a like purpose.

A. Exactly similar labels already issued from our former business address, 56 Basinghall street, in the commencement of the year 1871.

Q. 56. What use was made of those labels, if you know?

A. They were put on the packages that we sent to our different agents and customers.

Q. 57. By whom were those labels affixed to the packages?

A. In the onset we sent them to Rahtjen when he manufactured the paint for us in Germany, and subsequently, when Mr. Rahtjen made the paint for us in England, they were sent to him to be put on the packages.

Q. 58. How long were the labels such as the sample in evidence used to mark the goods sold by your firm, if you know?

A. For several years.

Q. 59. I show you a printed document. Will you please inspect it and see what it is?

97 A. It is virtually our first circular in which we state that we were appointed sole agents for the Rahtjen's composition.

Q. 60. What is the matter on the third page of the circular?

A. The "directions for use" for No. 1 and No. 2 and No. 3.

Q. 61. Of what, if anything, is the matter on page 3, in substance, a copy?

A. Of the labels that we put on the package.

Complainant's counsel offers the circular in evidence, and the same is received and marked "Complainant's Exhibit W."

Q. 62. State what use was made of the circular which you have produced?

A. It was sent to our different clients and also agents to make use of it, and the signature denotes that we were particular to uphold the name of Rahtjen, an additional element of security against bogus imitations.

Q. 63. As I understand, substantially the subject-matter of page 3 was used in the form of labels and sent to Mr. Rahtjen, and by him affixed to the packages imported by you?

A. Yes.

Q. 64. I notice in the headings in this circular the word "patent" as applied to the compositions. State why, and how, that word was thus used by you.

A. It was used very much in the same relation as "patent" medicines are used, and as referring to an invention. The patent laws in Germany were at that time very vague. I do not even know whether a patent office existed in the early seventies, but compositions of this kinds were looked upon as inventions, and it was in the ordinary course that they were called "patent."

98 Defendant's counsel objects to so much of the witness' answer as refers to the laws of Germany, on the ground that no proper foundation for the same has been laid, the witness

not having been shown to be conversant with the German laws in reference to patents and the like.

Q. 65. State whether or not this way of designating Rahtjen's compositions was employed by Mr. Rahtjen in Germany at the time you took the agency.

A. It was.

Q. 66. Then this was in effect a copying of his method of describing it?

A. It was.

Q. 67. I quote from your previous testimony:

"Q. 28. State whether or not the London office of Suter Hartmann & Rahtjen's Composition Co., Ltd., has all of the books, accounts, papers and so forth of the Liverpool and London business of Suter Hartmann & Co. for the years 1871, 1872 and 1873? A. Yes, to the best of my belief."

State whether or not you have made further enquiry and investigation and wish to modify that answer or not?

A. I would like to modify that answer because many books and papers of so many years ago are apt to be destroyed or done away with as obsolete. The branches kept books and papers, but what we have had access to in London has been searched.

Q. 68. I show you a show-card. State, if you know, what that is?

A. That represents the "Great Eastern."

Q. 69. Whose and what is this show-card?

A. Showing that that ship was coated with Rahtjen's composition in the seventies, the exact year I do not remember, but I believe this is the second show-card that we issued.

Q. 70. It is issued then by whom?

A. By Suter Hartmann & Co.

99 Q. 71. Do you know about when that was first issued?

A. After 1880.

Q. 72. Can you say any more definitely than that it must have been after 1880?

A. I do not remember the exact year that this was issued.

Q. 73. Do you know how many of these were issued?

A. I should think several hundred.

Q. 74. How were they used?

A. For advertisement sake.

Q. 75. Where were they distributed?

A. In railway stations, in docks, and ship companies' offices, and ship-owners' offices, and everywhere in general for advertisement purposes.

Q. 76. What are the names at the bottom of the show-card?

A. They were clients of ours who used the Rahtjen's composition and kindly allowed us to refer to them for testimonials.

Complainant's counsel offers the show-card in evidence and the same is received and marked "Complainant's Exhibit X."

Q. 77. State if you know about how long this show-card was used by your firm?

A. I should think six or seven years.

Complainant's counsel also offers in evidence another show-card, the same being duplicate of "Complainant's Exhibit O," but with the original firm address*ed* disclosed, and the same is received and marked "Complainant's Exhibit Y."

Cross-examination by Mr. McMASTER:

X Q. 78, 79, 80. In opening your deposition your age was not enquired about. How old were you when the firm of Suter Hartmann & Co. was formed?

A. About 27.

100 X Q. 81. Was the business of that firm solely the sale of Rahtjen's composition?

A. It was solely established for that purpose.

X Q. 82. Did you carry on any other business except the sale of Rahtjen's composition?

A. We may have done in course of time. But that was the essential specialty for which that firm was established.

X Q. 83. You say you may have carried on some other branch of business. Do you know whether the firm did or did not?

A. Oh, yes; there may have been a transaction for instance in a boiler coating.

X Q. 84. Did your firm handle any silk?

A. Not Suter Hartmann & Co.

X Q. 85. You were a member of the firm of James Suter & Co., were you not, before the firm of Suter Hartmann & Co. was formed?

A. I was.

X Q. 86. Did that firm handle any silk?

A. Yes.

X Q. 87. That was their principal business, was it not?

A. It was one of the articles we sold.

X Q. 88. And the principal article that you sold?

Objected to as incompetent, irrelevant and immaterial.

A. I do not know that it was the principal article. We had many.

X Q. 89. Let me ask you about the connection, if any, between A. C. Holzapfel, or the firm of Hartmann & Co. of which A. C. Holzapfel was a partner, so far as relates to your firm. Did A. C. Holzapfel or his firm of Hartmann & Co. buy the Rahtjen's composition from your firm?

A. We made them agents; he came to us as a clerk first in Liverpool, and then for a short time in London; we sent him to Cardiff, where he subsequently joined my brother in partnership.

101 They carried on our agency in the name of Hartmann & Holzapfel. This Cardiff firm opened a branch house in Newcastle, to which Mr. A. C. Holzapfel was sent to conduct the agency. The firm was opened there as Hartmann & Co.

X Q. 90. You have not replied to my question. Please hear the question read again and then answer it. (Question repeated.)

A. We supplied them; they represented us as agents, and I am not sure whether they received a commission on what they sold, or whether they made their own price for the district which they worked for us.

X Q. 91. Would your books show that fact?

A. Yes, I have no doubt.

X Q. 92. Before closing your testimony, will you examine this matter and refresh your memory, and let me know whether the goods were bought outright, or whether they were sent to them to sell on commission.

Objected to as incompetent, irrelevant and immaterial.

A. Yes. Would you save yourself trouble by hearing my further reply that I think the good- were invoiced to them at an agreed price. They were sold to them outright under agreement.

X Q. 93. The Rahtjen composition then, as I understand, was sold by your firm to A. C. Holzapfel, or his firm of Hartmann & Co. outright, under some agreement that you refer to?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, under contract.

X Q. 94. I now show you a paper which you have introduced in evidence marked "Complainant's Exhibit D No. 1 and 2," and ask whether your firm paid for those circulars or had anything
102 to do with the composition of the same or the printing and issuing of the same?

Same objection.

A. These were simply circulars and I have no doubt that our agents, Hartmann & Co., paid for their own stationery.

X Q. 95. Your firm did not pay for these?

Same objection.

A. I do not think so.

X Q. 96. And your firm had nothing to do with the getting up of these?

Same objection.

A. Not that I remember.

X Q. 97. I now show you the letters from H. C. Holzapfel which you have introduced in evidence as "Exhibit C, No. 1 and 2," and ask you if your firm had anything to do with the getting up of the letter-heads or paying the bill of the same in regard to those?

Same objection.

A. We had nothing to do with the getting up of the letter-heads, but we certainly should have objected to it if there had been anything objectionable in it. They simply state, "Rahtjen's patent composition for coating ships' bottoms."

X Q. 98. Did you pay for the letter-heads?

Same objection.

A. We did not.

X Q. 99. Did you pay for printing or engraving the letter-heads forming part of "Exhibit B, No. 1 and 2"?

Same objection.

A. No.

103 X Q. 100. You or your firm had nothing to do with the running expenses of the carrying on of the business by A. C. Holzapfel or by his firm of Hartmann & Co. or Hartmann & Holzapfel?

Same objection.

A. Our agents in Cardiff and Newcastle paid their own working expenses, such as stationery, etc.

X Q. 101. Hartmann & Co. and A. C. Holzapfel, or Hartmann & Holzapfel paid all the running expenses of that business, did they not?

Same objection.

A. So far as I know, yes.

X Q. 102. Now you have referred to an agreement under which this paint was sold to them. What was that agreement—was that in writing?

Objected to as incompetent, irrelevant and immaterial, and particularly as the answer was adduced by a question in itself incompetent, irrelevant and immaterial, having nothing whatever to do with the issues involved herein.

A. I do not remember. No doubt terms were agreed upon in correspondence—by letter or correspondence or otherwise.

X Q. 103. You have referred to an agreement and rather thrust the fact upon us that there was an agreement. Do you not remember what that agreement was?

Same objection.

A. No, I certainly do not. It is 25 or 30 years ago.

X Q. 104. Will you look at your evidence and see if there was any such agreement?

Same objection.

A. Yes, if my counsel so advises.

104 X Q. 105. Did your firm impose any terms on A. C. Holzapfel or his firm of Hartmann & Co., or Hartmann & Holzapfel, in regard to the price at which the Rahtjen's composition supplied them should be sold by them?

Objected to as incompetent, irrelevant and immaterial.

A. I do not think so. They were allowed to make their selling price.

X Q. 106–107. They were free to fix the price themselves at which they sold?

Same objection.

A. Yes, as most of the ships were quoted for a lump sum.

X Q. 108. And they were free to fix that sum?

Same objection.

A. Yes.

X Q. 109. If they paid for the paint outright and could sell it at such price as they made themselves, do you think that there was any agreement covering any other points at that time?

Same objection.

A. I do not remember.

X Q. 110. If your firm sold the paint outright to A. C. Holzapfel or his said firms, and they sold the paint to their customers at prices to suit themselves, in what way was your firm their principals?

Same objection.

A. Because we had the sole sale and appointed them agents for that district that they worked, so we were their principals.

X Q. 111. When they had bought this paint from your firm and paid your firm for it, had they not discharged all their duties which they owed you?

Same objection.

A. Certainly not.

105 X Q. 112. What other, if any, duties did they owe you?

Same objection.

A. We should have insisted upon it that they sold it as "Rahtjen's composition."

X Q. 113. Did you ever require from them any guarantee that it should be sold as "Rahtjen's composition"?

Same objection.

A. That was undoubtedly the understanding.

X Q. 114. Do you remember whether you ever prescribed such a condition in any of your dealings with them?

Same objection.

A. No. I looked upon that as self-understood.

X Q. 115. Were there any other duties which A. C. Holzapfel or his said firms owed your firm except paying for the goods which they received and selling them as Rahtjen's composition as you say?

Same objection.

A. That they should conduct their agency in a proper way. That was also self-understood.

X Q. 116. Now, referring to the writ, "Exhibit F," let me understand the facts in reference to that. This writ was the first paper in a suit which your firm brought against A. C. Holzapfel, was it not?

Same objection.

A. I am not sure whether it was the first. I am told it was the first.

X Q. 117. No injunction was obtained in that suit, was there?

Same objection, and further objected to as calling for secondary evidence.

A. What does "injunction" mean—to stop them from—I have not seen it since—this is 20 years ago.

106 X Q. 118. Do you remember whether you ever did anything in that suit further than obtaining and serving the writ, that being the first paper in the suit?

Same objection.

A. I believe I served this writ on Mr. A. C. Holzapfel, and he asked forgiveness for his misdeeds.

Defendant's counsel objects to so much of the answer as follow the words, "I believe I served this writ on Mr. A. C. Holzapfel."

(Counsel for complainant informs witness that if in order to answer the question of counsel he needs to explain the reasons for what he did, he can do so.)

X Q. 119. Now after serving this writ, as you say on Mr. A. C. Holzapfel, did you ever take any further step in that suit?

Same objection.

A. We forgave him his misdeeds and gave him a new trial for which he pleaded.

Defendant's counsel objects to answer as not responsive, and question is repeated.

A. So far as I remember no legal steps against him.

X Q. 120. At the time that you served this writ on Mr. Holzapfel, do you remember reproaching him for having contemplated entering into an opposition against you or your firm and asking his reasons for so doing?

Same objection.

A. I do not remember.

X Q. 121. Do you remember Mr. Holzapfel telling you that this was due to your firm's refusal to give him an agreement and that he was a married man and had to take care to improve his

107 position and not to be entirely dependent on the good will of anybody or anything substantially to that effect?

Same objection.

A. I certainly do not remember that.

X Q. 122. Do you remember any conversation in reference to Mr. Holzapfel's requirement that there should be a written contract between your firm and himself?

Same objection.

A. I do not remember.

X Q. 123. Do you remember whether you had any conversation with him at the time that you served the writ?

Same objection.

A. Yes, I was very angry with him.

X Q. 124. Do you remember what you said to him?

Same objection.

A. I do not remember the substance.

X Q. 125. Do you remember the substance of what he said to you?

Same objection.

A. Except that he pleaded hard for forgiveness.

X Q. 126. Your firm did give him immediately after that a ten years' contract, did you not?

Same objection.

A. I do not remember, it may be so. That certainly he did not deserve.

X Q. 127. Your recollection of what took place at that time is not very clear and distinct, is it?

Same objection.

A. No, it being 20 years ago.

X Q. 128. After serving this writ on him, however, and
108 whatever arrangement was made between you, he went on and sold the Rahtjen's composition, did he not, for your firm?

Same objection.

A. For a year or two, yes.

X Q. 129. And did you not have a written agreement with him that he should sell this composition for more than a year or two?

Same objection.

A. I do not remember.

X Q. 130. You remember an arbitration which subsequently took place, do you not, in regard to some claims you had against him?

Same objection.

A. Yes, perfectly.

X Q. 131. Do you not remember that that was for a breach of this contract that I am inquiring about?

Same objection.

A. It was for breach of contract, and for adulteration of our composition—of "Rahtjen's composition."

X Q. 132. Was not that contract which you then claimed a breach of the contract that was made immediately after the service of the writ of summons on Mr. Holzapfel and the arrangements which your firm then made with him?

Same objection.

A. Very likely.

X Q. 133. Do you not remember that that contract was for a considerable term of years?

Same objection.

A. It may have been so—yes.

X Q. 134. But you have no distinct recollection?

Same objection.

109 A. I have not.

X Q. 135. When did you first learn that Holzapfel & Company were making a composition for ships' bottoms which they were selling under a name, of which the word "Rahtjen" formed part?

Objected to as irrelevant, incompetent, and immaterial, unless the question is confined to the business done in the United States.

A. I do not remember the year.

X Q. 136. Was it soon after the firm of Holzapfel & Company had commenced business?

Same objection.

A. I think so.

X Q. 137. It was before the time that you applied for registered trade-marks, was it not?

Same objection.

A. I am not sure.

(Adjourned to tomorrow, the 31st of August, at 11 o'clock a. m., to the same place.)

31ST AUGUST, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. WILLIAM HARTMANN by Mr. McMASTER resumed:

X Q. 138. Please look at "Complainant's Exhibit B No. 1," and read that letter, and state whether it does not refresh your memory regarding the giving to A. C. Holzapfel of a ten years' agency or ten years' contract.

A. It does.

X Q. 139. And such a contract was made with Mr. Holzapfel as embodied in that letter?

110 A. Yes; that was the understanding.

X Q. 140. When did James Suter & Company first begin the sale of Rahtjen's composition?

A. James Suter & Company was in existence when we applied to Rahtjen for the sole sale of the paint. As soon as we arrived with Mr. Rahtjen at an understanding, the firm Suter Hartmann & Company was constituted a few months after, in January, 1871.

X Q. 141. And then what became of the firm of James Suter & Company; did that still continue?

A. It was still in existence for a year or two and gradually liquidated.

X Q. 142. Can you give me the exact date when the firm of James Suter & Company ceased to exist?

A. I think in 1873 or 1874.

X Q. 143. But you cannot give me the date?

A. No, not the exact date without referring; because we confined our sole attention then to the Rahtjen's composition.

X Q. 144. James Suter & Company did not sell or have Rahtjen's composition after the firm of Suter Hartmann & Company was formed?

A. No, not at all.

X Q. 145. Did James Suter & Company have any written agreement with John Rahtjen & Company in regard to the sale of the Rahtjen composition?

A. I believe the very first agreement in which Mr. Rahtjen gave us the sole sale for ten years was made in the name of James Suter & Company. Then afterwards (I think that was a month or two later) Mr. Rahtjen gave us a document in the form of a letter or short agreement made out in the name of Suter Hartmann & Company, the firm being already established.

X Q. 146. Was the agreement between John Rahtjen and James Suter & Company in writing?

A. Yes, it was.

X Q. 147. Will you look for that agreement and if you find
111 it produce the same for inspection, and offer the same or a complete copy of the same in evidence?

A. I have looked and it cannot be found.

X Q. 148. When did you see it last?

A. I do not even recollect.

X Q. 149. Now what time in January, 1871, was it that the firm of Suter Hartmann & Company was formed?

A. I cannot state the date. I notice that our first circulars were dated January; they were issued by Suter Hartmann & Company.

X Q. 150. But did not the firm of Suter Hartmann & Company have some articles of copartnership or agreement between the members?

A. We had none.

X Q. 151. Where was the place of business of Suter Hartmann & Company when they were first formed?

A. 56 Basinghall street, London.

X Q. 152. Did that firm take a lease of any premises that would enable you to fix the time when the firm came into existence?

A. No; we simply rented a first floor in Basinghall street.

X Q. 153. You had no written lease of that floor?

A. Very likely we had.

X Q. 154. Would not that lease enable you to fix a time when the firm was formed?

A. No; if a lease was in existence that would have been in the

name of James Suter, or James Suter & Company, which firm was established in 1865.

X Q. 155. So that when Suter Hartmann & Company were formed, they simply occupied part of the premises that previously had been occupied by James Suter & Company.

A. Yes; the partners being the same.

X Q. 156. Did the firm of Suter Hartmann & Company have any other place of business than that at 56 Basinghall street?

A. Yes; soon after in Liverpool.

112 X Q. 157. Whereabouts?

A. At No. 12 Rumford place.

X Q. 158. Did the firm lease those premises?

A. Yes; they leased the office.

X Q. 159. When was that lease made?

A. That must have been 1872 or 1873, and we are at the present day still in the same premises.

X Q. 160. Can you not ascertain which date that was positively?

A. I could if you wish.

X Q. 161. Please do so before finally closing your deposition.

Counsel for complainant objects that the evidence called for is irrelevant, immaterial and incompetent, and that therefore the hearing should not be delayed and the record complicated by the addition of such evidence.

X Q. 162. From the time that you first took this Liverpool office up to the present time, as I understand you, your firm has remained in constant occupation of it?

A. Yes.

X Q. 163. And has never had any other office in Liverpool?

A. No.

X Q. 164. Now when the firm of Suter Hartmann & Co. was formed, was any agreement in writing made between that firm and the firm of James Suter & Co. who had the ten years' agency as I understand you for the sale of this composition?

A. Do you wish to know whether any agreement was made between Suter Hartmann & Co. and James Suter & Co.?

X Q. 165. Yes.

A. So far as I know no agreement was made.

X Q. 166. Was any agreement in writing made between Suter Hartmann & Co. and the firm of John Rahtjen?

113 A. Nothing but correspondence.

X Q. 167. Can you produce that correspondence?

A. I produce a letter of Joh. Rahtjen, dated Bremerhaven, 13th May, 1871, addressed to Suter Hartmann & Co., an English translation of which is as follows:

"Joh. Rahtjen, Bremerhaven. I received from Messrs. Suter Hartmann & Co. the amount of £70.17.8 in settlement of my invoices dated 8th February, 8th March and 4th April, 1871. In respect of our arrangement I confirm having given to you the sole sale for Great Britain and colonies for the term of ten years and bind myself to execute all orders for the said country and colonies for your ac-

count, no matter whether such orders reach me direct or from yourselves. Bremerhaven, May 13th, 1871. (Signed) Joh. Rahtjen. Messrs. Suter Hartmann & Co., London."

I also produce a copy of another letter of Joh. Rahtjen dated Bremerhaven, 1884, an English translation of which is as follows:

"Herewith I give Messrs. Suter Hartmann & Co., of London, the sole sale of my composition for Great Britain and colonies up to December 31st, 1890. My other agents have got instructions not to interfere with the monopoly of Messrs. Suter Hartmann & Co., but I am not to be responsible for any violation of my orders. Bremerhaven, 1874. (Signed) Joh. Rahtjen."

These are the only items of correspondence in relation to the establishment of the agency of Suter Hartmann & Co. for John Rahtjen, which, after careful search, I have been able to find.

X Q. 168. Read the printed letter-head on the original letter which you have produced?

A. "John Rahtjen, Bremerhaven."

X Q. 169. When did the firm of Suter Hartmann & Co. remove from 56 Basinghall street?

A. In August, 1874.

114 X Q. 170. When did Mr. A. C. Holzapfel first enter your employ?

A. He entered our employ as clerk in Liverpool somewhere in the year 1875 I should think. I am not sure as to the exact year.

X Q. 171. How long did he remain in your employ in Liverpool?

A. I think my partner discharged him about 12 months after.

X Q. 172. That would make it about what time?

A. About 1875. I cannot remember as to the exact year or time.

X Q. 173. But you are giving us the dates as near as your memory serves you?

A. Yes.

X Q. 174. And after he left Liverpool he came to London as I understand and entered your employ in the London house?

A. I took compassion on him and employed him in our London office.

X Q. 175. How long was he employed there?

A. For a few months I think.

X Q. 176. And then as I understand you said he went to Cardiff and became your agent there?

A. Subsequently, yes.

X Q. 177. How long did he remain in Cardiff before he became your agent?

A. He went there on journeys from London and subsequently settled in Cardiff as our agent, I think, a few months after that.

X Q. 178. And subsequently formed a copartnership with your brother, Mr. John Hartmann?

A. Yes.

X Q. 179. Did the firm of Suter Hartmann & Co. manufacture this composition in Liverpool?

A. No, not in its entirety.

X Q. 180. I only meant generally?

A. Yes.

X Q. 181. When did they commence to manufacture it partially?

A. I believe in 1873.

115 X Q. 182. How long did they continue so to do?

A. I believe about twelve months.

X Q. 183. And then how did you get the paint?

A. Then Mr. Rahtjen came over from Germany and the factory was erected in Liverpool and the paint manufactured there.

X Q. 184. When was it that you first obtained this composition made by Mr. Rahtjen in his factory in Liverpool?

A. I think in the early part of 1875, so far as my recollection serves me—or 1874, I am not sure which.

X Q. 185. Do you remember when the factory erected for Mr. Rahtjen was completed and ready for use?

A. I am not sure whether it was in the early part of 1874 or 1875.

X Q. 186. Before closing your testimony will you try to ascertain that date for me?

A. Yes; I have refreshed my memory and I can say that it was the early part of 1874.

X Q. 187. Was Mr. A. C. Holzapfel in your employ in the Liverpool office when Mr. Rahtjen began to make this composition for you in the factory which had been erected for him in Liverpool?

A. Yes.

X Q. 188. Have you any date on your books showing the time when Mr. Holzapfel ceased to work in your Liverpool office and when he began to work in your London office?

A. I am not sure.

X Q. 189. Will you please look and find that out and tell me the result before closing your testimony?

A. I will.

X Q. 190. Referring to "Complainant's Exhibit V," when did you first use those labels?

A. In January, 1871, or at the commencement of Suter Hartmann & Co.

X Q. 191. Who printed those labels for you?

116 A. I do not know; some stationer in London no doubt.

X Q. 192. How many were printed for you in the first lot?

A. I do not remember.

X Q. 193. A considerable number?

A. A large number.

X Q. 194. Would not your books contain some entry in regard to the printing of those labels or the payment of the price therefor sufficient to show the name of the party who printed them?

A. Yes, they might.

X Q. 195. Before closing your testimony will you make such an examination and let me know the result?

A. I will.

X Q. 196. How long did you use these labels?

A. For many years.

X Q. 197. Up to about what time?

A. I cannot tell the time or the number of years we had them in use, but they were in constant use, and great care was taken that they should be used, as we thought it an extra security for the name of "Rahtjen's" to prevent spurious and bogus imitations.

X Q. 198. Did your firm of Suter Hartmann & Co. attach these labels to the casks, barrels, and the like, containing the composition, or did some other firm attach them?

A. Mostly we did ourselves, and some were also sent over to Germany when we imported the composition from Germany, and were attached to the packages there.

X Q. 199. You did not of course attach these labels yourself to the casks or barrels?

A. No—I may have done.

X Q. 200. Who was the man who had charge of that?

A. One of our employees, as it is generally done in such kind of work.

117 X Q. 201. But you cannot give me his name?

A. No, I cannot tell you his name; it is thirty years ago.

X Q. 202. Was any other label than that (Complainant's Exhibit V) ever used by your firm?

A. So far as I recollect there were three labels; one for No. 1, one No. 2 and one No. 3 composition, giving the directions for use, and bearing my signature under the following words, "None genuine without this signature."

X Q. 203. They were all, so far as the language was concerned, substantially the same as Exhibit V, with the exception that the Roman numerals would vary according to circumstances.

A. Yes, so far as I remember.

X Q. 204. Did your firm of Suter Hartmann & Co. ship any of these barrels, casks and the like containing this composition to A. C. Holzapfel or his firm of Hartmann & Co. or Hartmann & Holzapfel?

A. Yes.

X Q. 205. Now, with regard to the barrels or casks so shipped to A. C. Holzapfel or his said firm, do you know of your own knowledge whether any of these labels were on the same?

A. I have no doubt about it.

X Q. 206. But do you know of your own knowledge?

A. I believe they were.

X Q. 207. Did you see them on the barrels so shipped?

A. I do not recollect, it being so many years ago.

X Q. 208. And you did not put them on those barrels yourself?

A. I did not, but the instructions were, and the rule and practice was, to put them on all the packages that went out. Whether that was always enforced and always carried out especially to our own agents, who had nothing to do but to send the paint direct to the docks, I do not know; in certain cases they may not have ap-

118 peared, but our instructions were that all the packages should bear the labels.

X Q. 209. You are only telling me your belief as to what was

done rather than the personal knowledge which I enquire about; but as I understand you, so far as shipments to A. C. Holzapfel or his firm were concerned, you did not put the labels on those casks or barrels so shipped, and you do not know of your own knowledge that they were so put on. That is correct, is it not?

A. Yes.

X Q. 210. Did you use these labels on the casks or barrels containing this composition between the time that Rahtjen commenced to send you this composition from Germany and the time that Rahtjen began to manufacture it in England?

A. We did.

X Q. 211. Did you use these labels on these casks or barrels during the whole period that Rahtjen manufactured this composition in England?

A. To the best of my belief we did.

X Q. 212. You remember when the firm of Hartmann Bros. was formed, do you not?

A. I do.

X Q. 213. That was in 1880?

A. It was.

X Q. 214. You were a member of that firm?

A. I was.

X Q. 215. Now when that firm began to manufacture Rahtjen's composition in 1880, do you remember whether or not they used these labels on the casks or barrels?

A. Either these or stencil plates were used.

X Q. 216. How long did the firm of Hartmann Bros. continue to use labels like "Complainant's Exhibit V"?

A. I do not remember, but as drums came into larger use they bore stencilling marks, and the labels were more discontinued on account of their dropping off and becoming obliterated.

119 X Q. 217. Can you tell by your firm's books or any memoranda when you last had printed for use any of these labels?

A. I do not think we can.

X Q. 218. Did you always have them printed by the same printer or stationer?

A. I am not sure.

X Q. 219. Can you produce any original book, entry or bill, or other memorandum, relating to the printing or furnishing to you of such labels?

A. I am not sure, it being so long ago.

X Q. 220. Will you look and see if you can find such book, entry or data, or memorandum say, prior to 1883, and if you can will you produce the same?

A. I will, certainly.

X Q. 221. I understand from your previous testimony that Suter Hartmann & Co. never used any other labels than those substantially like this Exhibit V. Did Hartmann Bros. ever use any labels different from Exhibit V?

A. I do not think so.

X Q. 222. Do you think that Hartmann Bros. used labels like

Exhibit V for more than a year after they began the manufacture of Rahtjen's composition?

A. I believe they did.

X Q. 223. For more than two years?

A. I believe they did.

X Q. 224. For more than three years?

A. I am not sure. As I say, as drums came into more general use these labels were discontinued and stencils were used instead bearing the name of Rahtjen's.

X Q. 225. Did the labels continue to be used on the barrels and casks?

A. I am not sure, but I believe that stenciling was more resorted to.

X Q. 226. Now, can you not fix the time when the use of these labels was discontinued or practically discontinued?

120 A. I cannot fix the time.

X Q. 227. When did you first begin to use iron drums?

A. They were used before 1879 to a small extent, only now and then, but in 1879 and since then they came into larger use—larger quantities of drums were used so far as I recollect.

X Q. 228. Can you produce any invoices for composition sent out in drums prior to, say, the middle of 1880?

A. I may.

X Q. 229. Will you see if you can find such invoices before closing your testimony and let me know the result, or produce such invoices if found?

A. I will.

X Q. 230. Do you know when Mr. Rahtjen bought Mr. Heyl's business of making composition for ships' bottoms?

Objected to as incompetent, irrelevant and immaterial.

A. August, 1878.

X Q. 231. Was it before or after that that the Rahtjen composition was put up in iron drums?

A. I cannot say, but I will ascertain.

X Q. 232. Can you give me the name and address of the printer who printed Complainant's Exhibit W?

A. No, it being nearly 30 years ago.

X Q. 233. Did you have many of those circulars printed at that time?

A. Yes.

X Q. 234. Would not your books show some entry in reference to the furnishing to you of these circulars or payment therefor?

A. It is doubtful, because they were no doubt invoiced with other stationery that we had at the time.

X Q. 235. Do you remember whether the other stationery and these circulars were furnished by one and the same party?

121 A. I do not know; very likely by several at different times.

X Q. 236. Did you have more than one lot of these circulars printed?

A. I have no doubt many.

X Q. 237. Before closing your testimony will you see if you can find any entries or other data which would enable you to state when or by whom these circulars were printed?

A. I will have search made.

X Q. 238. The complainant has furnished evidence of shipments to the United States up to 1884. Will you give me the amounts per year of Rahtjen's composition shipped to the United States for 1885, 1886 and 1887?

A. Before closing my testimony I will produce them.

X Q. 239. In those years was it customary for the agents in New York to report to you the vessels painted with the Rahtjen's composition?

A. I do not know whether it was the custom to receive such reports from our agents in New York; in England, undoubtedly, it was the custom.

X Q. 240. Will you before closing your testimony see if you can furnish me with the names of the vessels painted with Rahtjen's composition in the United States during those years, that is to say, 1885, 1886 and 1887?

A. I will have search made.

X Q. 241. Will you before closing your testimony give me the dates of the commencement and termination of the exclusive agency of your firm of Hartmann, Le Doux & Maecker in the United States?

A. I will.

(Adjourned to 2.30 o'clock p. m., at the same place.)

122 (Examination resumed after recess:)

X Q. 242. When was the firm of Hartmann, Le Doux & Maecker dissolved?

A. I think about 1888.

X Q. 243. Before closing your testimony will you look that up and give me the date of the dissolution of the firm of Hartmann, Le Doux & Maecker?

A. I will.

X Q. 244. Were all the goods which you or your firm of Suter Hartmann & Company furnished to Hartmann, Le Doux & Maecker Rahtjen's composition?

A. I think so; I am almost sure.

X Q. 245. Did your firm of Hartmann Bros. ever furnish any other article to the firm of Hartmann, Le Doux & Maecker except Rahtjen's composition?

A. Possibly.

X Q. 246. What other goods?

A. I am not sure whether it was a boiler composition that we sent them.

X Q. 247. Did the firm of Hartmann, Le Doux & Maecker ever handle a patent "knotting"?

A. I am not sure whether my New York house did.

X Q. 248. Did either of your firms in England furnish this patent knotting to Hartmann Le Doux & Maecker?

A. Yes, I believe we did.

X Q. 249. And during the time that Hartman- Le Doux & Maecker were the agents for Rahtjen's composition in the United States?

A. Yes.

X Q. 250. Were there large quantities of this patent knotting sent by your firms to Hartmann Le Doux & Maecker in the United States?

Objected to as incompetent, irrelevant and immaterial.

A. I think to a moderate extent.

X Q. 251. How was it marked and invoiced?

123 Same objection.

A. I do not know.

X Q. 252. Are your firm books relating to said matters still in existence?

Same objection.

A. I do not think so, because the firm was dissolved some years ago; the partner, Mr. Maecker, died subsequently, and I think the papers and things were destroyed.

X Q. 253. Will you swear that such patent knotting shipped to Hartmann Le Doux & Maecker in the United States was not marked as "Rahtjen's composition" and paid duty under that name?

A. To the best of my belief they were not marked as you describe because it was not Rahtjen's composition at all. I am sorry that you ask me that question because we were not in the habit of trickery like that.

X Q. 254. But as I understand you to state you do not know how the patent knotting was marked and invoiced when sent to Hartmann Le Doux & Maecker in the United States?

A. I do not, but I am pretty sure that those packages would not have been marked "Rahtjen's composition," because they did not contain Rahtjen's composition.

X Q. 255. Which of your firms furnished the patent knotting to Hartmann Le Doux & Maecker in the United States?

A. I do not know whether it was Suter Hartmann & Company or Hartmann Bros.

X Q. 256. The patent knotting was not the boiler composition that you have referred to in a previous answer was it?

A. No.

X Q. 257. Can you produce any of the invoices of the patent knotting shipped by either of your firms to Hartmann Le Doux & Maecker?

124 A. I do not think I can because we may have bought that knotting for the American firm and the invoices have gone direct to New York.

X Q. 258. Will you before closing your testimony have a search

made to see if you can find invoices or copies of invoices called for?

A. I will.

X Q. 259. Your firms made this patent knotting, did they not?

A. No.

X Q. 260. Who did make it?

A. A firm abroad.

X Q. 261. Do you remember the name of the firm?

A. I decline to say. I look upon that as a trade secret, and I decline to answer for that reason—that is my chief reason.

X Q. 262. I do not propose to enquire as to any trade secret or any question involving the character of the composition itself but merely the name of the party who made it. There is no trade secret in that is there?

Counsel for complainant requests counsel for defendant to state the purpose of this enquiry if it is not to discover a trade secret, and thereby enable the court to determine whether the questions are competent, relevant and material.

Defendant's counsel cheerfully complies with the request; so far no original invoices, no original books, no original entries, have been produced, and the purpose of this examination is to see whether or not the statements which purport to be gross amounts of shipments to Hartmann Le Doux & Maecker in the United States of Rahtjen's composition may not have contained some other composition which should not be credited to the shipments of the Rahtjen composition.

A. I decline to state, as it was not Rahtjen's and had nothing to do with Rahtjen's.

125 X Q. 263. Who made out the invoices of this patent knotting which you shipped to Hartmann Le Doux & Maecker?

A. I do not know that it was even called a patent knotting, nor do I know who made out the invoices. Possibly the firm did from whom the purchases were made.

X Q. 264. But this patent knotting enquired about passed through the hands of your firm did it not in its way to Hartmann Le Doux & Maecker?

A. I am not sure; it may have been shipped direct.

X Q. 265. Did Heyl use drums for the composition for ships' bottoms which he made?

A. I believe he did to some extent.

X Q. 266. Were those drums like the drums which you afterwards used for the Rahtjen's composition which you sold?

A. I dare say they were similar.

X Q. 267. Both drums had a sort of bottle-shaped top to them, did they not?

A. No, so far as I remember they had flat tops.

X Q. 268. Do you remember who made the drums when you first began to use them?

A. I do not, but I believe it was a firm of Noakes of London.

X Q. 269. Did your firm or their successors, the Suter Hartmann

& Rahtjen's Composition Co., ever change the shape of the drums from the time they first began to use them?

A. Scarcely.

X Q. 270. According to your recollection they were flat at each end?

A. Yes, so far as I can recollect.

X Q. 271. And the drums which Heyl used were also flat at each end?

A. I think so.

X Q. 272. The drums had about what capacity?

A. They were different sizes; half cwt. and cwt. drums.

126 Some long-necked drums may have been used from the works to be sent down to the docks for our own use, backwards and forwards, and they may have had round bottle necks as you describe. But what was sent out to customers so far as I recollect only had flat ends.

X Q. 273. And did Noakes also make a bottle neck or conical-topped drums?

A. I do not know.

X Q. 274. Now referring to "Complainant's Exhibit J," I note that there was previous correspondence in reference to the subject of Rahtjen's composition. Can you produce such correspondence?

A. I will search for it and produce it if possible.

X Q. 275. Did your firm do any substantial business in regard to Rahtjen's composition with the Peninsular & Oriental Steam Navigation Co. prior to 1873? Was it not merely trials or experimental work that was done prior to that time?

A. Yes, experimental. May I add to this answer that constant and large orders for the P. & O. were received for Rahtjen's composition from 1874 upwards to the present day.

Counsel for the defendant objects to all the answer after the words "Yes, experimental" as not responsive.

X Q. 276. Look at the letter which I now show you written on your office paper, and dated January 8th, 1875, and state if you recognize the handwriting or the signature of that; and, if so, in whose handwriting is it?

A. That is in my own handwriting and signed by myself.

X —. 277. It is on your usual office heading?

A. Yes, that we used in those days.

X Q. 278. Now, after reading this letter, do you not remember that even in 1874 the work which you did for the P. & O. Company was simply of a trial or experimental kind?

127 A. A large company does not rush in adopting a new material, but frequent trials are made, and after 1874 the company used Rahtjen's composition extensively and for many years past on their entire fleet.

X Q. 279. But this steamer "Deccan" was an experimental trial test?

A. They were virtually on their trial for the first four or five

dockings, and I believe that this ship was coated then by us for a second time.

X Q. 280. I call your attention to the words in your letter, "We have not had coated a more important ship," and ask you whether that does not refresh your memory sufficiently to say that this was probably the first time that this vessel was painted with Rahtjen's composition?

A. It may have been; I do not say that it has not.

The letter on which the witness has just been examined is offered in evidence by defendant's counsel and marked "Defendant's Exhibit Suter Hartmann & Co.'s Letter of January 8th, 1875."

Objected to as incompetent, irrelevant and immaterial.

X Q. 281. Now look at "Complainant's Exhibits K, No. 1 and No. 2," and let me ask you whether the work there described was not of an experimental or trial character?

A. No; that was not of an experimental character because there were orders already. May I add they were the result of a very successful trial of Rahtjen's composition on the royal mail steamer "Tasmania."

X Q. 282. How many of the Royal Mail Steam Packet Company's ships had you or your firm coated with Rahtjen's composition prior to these orders of July and September, 1872?

128 A. I do not know, but we have coated the whole fleet for years up to the present day.

Defendant's counsel objects to all of the answer following the words, "I do not know," as not responsive.

X Q. 283. When did you coat with Rahtjen's composition the steamer "Tasmania"?

A. I think in 1871—some time in 1871.

X Q. 284. When was the "Tasmania" next painted with Rahtjen's composition if you know?

A. I do not know.

X Q. 285. Was the "Tasmania" painted a second time prior to these orders of July 5th and September 23d, 1872?

A. I do not remember.

X Q. 286. Do you know whether any vessel of the Royal Mail Steam Packet Company other than the "Tasmania" was painted with Rahtjen's composition prior to July 5th, 1872?

This line of examination is objected to as incompetent, irrelevant and immaterial.

A. I do not remember, it being nearly 30 years ago.

X Q. 287. Before closing your testimony will you give me if possible, a list of the names of vessels of the Royal Mail Steam Packet Company that you coated with Rahtjen's composition prior to 1875, and if possible the dates when they were coated?

Same objection.

A. I will search for it.

X Q. 288. As I understand the sale or use of Rahtjen's composition by you was largely experimental prior to 1874?

A. No: we executed good orders already; with certain ship-owners and certain companies certainly it was experimental but our business grew rapidly.

129 X Q. 287. But in those early days it was largely experimental until you could get the thing introduced, was it not?

A. Certainly, to some extent.

X Q. 288. Look at the first paper, being part of "Defendant's Exhibit Holzapfel and Co.'s Circulars, Advertisements, Letter-heads and so forth," and state whether you have not seen that circular or a copy of it before?

A. I believe I have.

X Q. 289. And about the time that it bears date, the 17th April, 1883?

A. Yes, I believe so.

X Q. 290. Is your company the Suter Hartmann & Rahtjen's Composition Company contributing to the expense of this suit in any way?

A. No, except that we are largely interested in the Rahtjen's American Composition Company, it being an offshoot of the parent company in England.

X Q. 291. But the company in England is not directly paying any of these expenses attending this suit or the litigation?

A. Not to my knowledge; in fact I am sure not.

X Q. 292. The only way in which you are contributing then to the expense is simply as a stockholder in the American Co.?

A. Yes.

Adjourned to tomorrow morning 1st September at 10.30 o'clock a. m. at the same place.

4TH SEPTEMBER, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. WILLIAM HARTMANN, by Mr. McMASTER, resumed:

X Q. 293. Can you produce the data called for on your previous examination?

130 A. As to the date of the establishing of the Liverpool office of Suter Hartmann & Co., the books of the firm show that it must have been about June, 1872, as the first entry is of the 13th June, 1872. The date of the commencement of business by John Rahtjen in the new factory in Liverpool must have been about October, 1874, instead of January, 1874, that being the date of the first shipments from the factory, which were erroneously given as January. The dates when A. C. Holzapfel came into the employ of the firm at Liverpool and afterwards at London appear to be as stated by him April, 1874, at Liverpool and December, 1874, at London. Very careful search has been made for printers' bills for the printing of the labels and also the circulars of 1871. No such bills can

be found. A large number of invoices for Rahtjen's composition in drums in the years 1878 and 1879, the first being July, 1878, have been found. As to the amount of sales of Rahtjen's composition by our firm to the United States subsequent to the year 1884, I have had prepared and personally verified a statement showing these sales from January, 1885, to September, 1891, inclusive. I should like to place upon the record the totals of these sales for the years 1879 to 1891 inclusive; the last six months of 1879, 70 cwt.; 1880, 120 cwt.; 1881, 300 cwt.; 1882, 320 cwt.; 1883, 422 cwt.; 1884, 620 cwt.; 1885, 544 cwt.; 1886, 550 cwt.; 1887, 450 cwt.; 1888, 360 cwt.; 1889, 1,175 cwt.; 1890, 1,007 cwt.; and down to and including September, 1891, 1,063 cwt. These shipments were made until June, 1886, to Hartmann le Doux and Maecker, from July, 1886, to December, 1888, to Emil Maecker, the agent succeeding Hartmann le Doux and Maecker, and from January, 1889, to September, 1891, to Otto L. Petersen, who succeed- Emil Maecker, and sundry other agents in the United States.

131 As to the names of ships coated by our agents in the United States in the years 1885, 1886, and 1887, I find only one statement covering the first six months of 1885, which shows in the several columns the vessels coated in the port of New York during that period with the various compositions sold in that market, the first column, Rahtjen's, 39 vessels, the second, McInnes, 25, the third, Williams, 23, and the fourth, Hutson, 18.

As to the date when the firm of Hartmann le Doux & Maecker was dissolved I produce a circular dated 1st July, 1886, announcing that *that;* also a circular of the same date announcing the continuance of the business of that firm by one of the partners, Emil Maecker.

As to the correspondence called for in your question X 274, I have had copies made and carefully verified of all letters which have been found, and submit these copies herewith.

As to the list of vessels asked for in R. X 287, I have had prepared from our books and carefully verified the following dates and names from the 31st of October, 1871, to the 31st of December, 1874: 1871, October 31st, "Corsica" £52.2.2; 1871, November 28th, name of ship not found, £27.15.9; 1872, February 10th, "Belzie" £61.8.0; July 29th, name of ship not found, £91.6.2; September 28th, "Douro," £10.9.10; September 25th, "Liffey," £67.5.3; November 13th, "Belize," £61.15.2; 1874, January 14th, "Belize," £91.18.9. In reference to these various copies, which I have produced, I wish to say that counsel for the defendant is welcome to examine the original books from which the copies were made, in order to verify the statements and copies.

Defendant's counsel offers in evidence the copy of correspondence with J. M. Lloyd, secretary of the Royal Mail Steam Packet Company, dated August the 8th, 1871, August the 17th, 1871, August the 18th, 1871, and August the 28th, 1871; and the same is

132 marked "Defendant's Exhibit Suter, Hartman & Co.'s Correspondence with Royal Mail Steam Packet Company, August, 1871."

X Q. 294. Who was carrying on the business for you at Liverpool when Mr. A. C. Holzapfel entered your employ in that office?

Objected to as incompetent, irrelevant and immaterial.

A. The firm of Suter Hartmann & Co.

X Q. 295. Who was in charge of the Liverpool office at that time?

Same objection.

A. My partner Mr. Richard le Doux.

X Q. 296. Do you remember during the time that Mr. A. C. Holzapfel was in the Liverpool office, Mr. le Doux becoming ill and going to Germany or going abroad?

Same objection.

A. I don't remember.

X Q. 297. Do you remember where you first met Mr. A. C. Holzapfel?

Same objection.

A. I may have seen him in Liverpool during the time he was employed there as junior clerk.

X Q. 298. Do you not remember meeting Mr. A. C. Holzapfel in the Liverpool office during the term of his employment there at a time when Mr. le Doux had gone abroad for his health?

Same objection.

A. I do not remember that.

X Q. 299. Such an occurrence may have happened, however, may it not?

Same objection.

A. Yes; very likely.

133 X Q. 300. During the period of Mr. A. C. Holzapfel's employment in your Liverpool office, is it not a fact that the composition was manufactured by Mr. le Doux?

A. Yes; partially, because the paint in the early days during some time of our sole sale was received from Bremerhaven in the form of paste, and then finished in Liverpool.

X Q. 301. And it was not until after that that Mr. Rahtjen came over to Liverpool and commenced the manufacture of it himself?

A. I do not think that paste was received after Mr. Rahtjen came to Liverpool to manufacture.

X Q. 302. What were the data which you consulted which enabled you to fix the date which you have given as the commencement of the manufacture of this composition by Rahtjen in the new factory in Liverpool?

A. Certain raw materials were purchased in London and sent to Mr. Rahtjen for his factory in Liverpool, and these were invoiced so far as I remember now in the early part of 1874, or during 1874.

X Q. 303. On those invoices did the address of the new factory appear anywhere?

A. No; so far as I remember they were simply invoiced to John Rahtjen, Liverpool.

X Q. 304. Will you spread on the record before closing your examination the entry which enable- you to fix the time when Rahtjen commenced the manufacture of this composition in the new factory in Liverpool?

A. I will.

X Q. 305. Have you any other fact or data which would enable you to fix the time when Rahtjen commenced the manufacture of his composition in Liverpool as October, 1874, except this entry which you have consulted?

A. I think not.

134 X Q. 306. You have referred to labels being sent to Mr. Rahtjen abroad to place on the casks or kegs or vessels containing this composition?

A. Yes.

X Q. 307. When do you remember they were first sent him for that purpose by your firm?

A. I remember that they were sent to him almost directly after we undertook the sole sale for Rahtjen in England. I have also found a letter-press copy dated the 8th of February, 1872, addressed to Mr. John Rahtjen in Bremerhaven, ordering 5 cwt. of composition to be sent. That letter bears a postscript as follows:

"Mr. Henry Hartmann, Senior, took on his return journey thence" (that is to Bremerhaven) "some circulars and direction papers which he will hand to you if possible on Saturday."

This copy of letter you are at liberty to inspect if you so desire.

X Q. 308. I am asking you when you or your firm sent to Mr. Rahtjen the labels which you have introduced in evidence, for the purpose of his attaching them to the composition which he made for you in Germany. Do you remember when you first sent such labels to him for that purpose?

A. I have said as soon as we started business in the commencement of 1871.

X Q. 309. For what purpose were these labels sent to Mr. Rahtjen at that time?

A. To be fixed to the packages of Rahtjen's composition.

X Q. 310. The packages intended to be shipped where?

A. To be shipped anywhere.

X Q. 311. To the United States?

A. Subsequently, no doubt.

X Q. 312. Well, at that time?

A. We did not ship any composition in 1871 from England. We had nothing to do with the shipment of composition to the United States in 1871. Those orders were executed by Mr. Rahtjen direct.

135 X Q. 313. Then for what market were these labels which you sent Mr. Rahtjen placed on the casks or barrels containing the composition?

A. For the general market.

X Q. 314. In 1871?

A. Yes.

X Q. 315. By "for the general market" do you mean all over the world?

A. All over the world where we supplied the composition to.

X Q. 316. But you had not anything to do as I understand it with the general market all over the world in 1871?

A. We had a certain large district.

X Q. 317. And that district embraced what territory?

A. England and the colonies, or some of the colonies. I cannot remember the exact district that we worked in the commencement of our career.

X Q. 318. But you are sure that those labels were not placed on the packages in 1871 intended for shipment to the United States?

A. No, because Rahtjen, as I have said before, had at that time his own agent, Henry Gelien, and our labels bearing our signature would not be applicable.

X Q. 319. And that condition of affairs remained, did it not, until you got the United States agency?

A. Yes, I think so.

X Q. 320. And as I remember that was some time in 1878?

A. Yes, I think so.

X Q. 321. I do not wish to encumber the record by additional exhibits, but I would like to have you, for the satisfaction of my clients, produce a copy of, say, the first invoice of shipment of this composition to the United States, say in 1879, 1880, 1881, 1882 and 1883.

Objected to as incompetent, irrelevant and immaterial.

136 A. I will, simply omitting the prices.

Redirect examination by Mr. MERWIN:

Complainant's counsel offers in evidence the statement of account of "Rahtjen's compositions" furnished to agents in the United States from 1885 to 1891 inclusive referred to by the witness, and the same is received and marked "Complainant's Exhibit A A."

Defendant's counsel reserves all right of objection to the same until copies of the invoices called for have been produced.

Complainant's counsel also offers in evidence the copy of the list of ships coated — Rahtjen's composition and other compositions at the port of New York during the first five months of the year 1885 referred to by witness, and the same is received and marked "Complainant's Exhibit B B;" also the circulars, produced by witness, announcing the dissolution of the partnership of Hartmann le Doux and Maecker and the continuance of the business by Emil Maecker as the succeeding agent, and the same is received and marked "Complainant's Exhibit C C, 1 and 2," respectively, also copy of the letter produced by witness from Suter Hartmann & Co., dated February 8th, 1872, together with an English translation of the same, and the same is received and marked "Complainant's Exhibit D D."

Such of the exhibits introduced by complainant's counsel as are

in the German language it is agreed may be translated by some professional disinterested translator, and such translation appended to the exhibits, it being stipulated that the translator would, if called, testify that the same are true and correct translations of the originals.

Complainant's counsel also offers in evidence copy of an assignment by Hartmann Brothers and others to Suter Hartmann & Rahtjen's Composition Company, Limited, dated August 16th, 1888,
137 with the amounts and considerations omitted, and the same is received and marked "Complainant's Exhibit E E;" also copy of an assignment from Hartmann, Le Doux & Company, to the same corporation, of said firm's business and good will, dated August 28th, 1888, with the amounts and considerations omitted, and the same is received and marked "Complainant's Exhibit F F."

Defendant's counsel objects to the reception in evidence of said exhibit as incompetent in so far that certain dates and periods are left blank in the said copy, which dates and periods are filled in in the originals. Defendant's counsel has no wish to pry into the affairs of Suter Hartmann & Rahtjen's Composition Company, Limited, but claims that he is entitled to this data. As to the data relating to the consideration he waives that and consents that that data shall be left blank.

Complainant's counsel also offers in evidence copy of an assignment from Messrs. Hartmann Brothers to said corporation of said firm's business and good will, also dated August 28th, 1888, with the amounts and considerations omitted, and the same is received and marked "Complainant's Exhibit G G."

Defendant's counsel objects to the reception in evidence of this exhibit on the same ground as stated in regard to the last preceding exhibit.

Complainant's counsel also offers in evidence copy of an assignment from Messrs. Suter Hartmann & Co. and Messrs. "John Rahtjen" and G. F. Heyl to the same corporation, transferring to the said corporation the business of Suter Hartmann & Company and the right to royalties and to manufacture Rahtjen's composi-
138 tions, with the amounts and considerations omitted, and the same is received and marked "Complainant's Exhibit H H."

Defendant's counsel objects to the reception *to* the said exhibit in evidence except part 1 of the 1st schedule on the same grounds as stated in reference to the preceding exhibits.

R. D. Q. 322. State whether in the examination which you have had made in the office of your company in carrying out the requests of counsel for defendant for production of documents and other evidence, you have come upon any contract or correspondence with reference to any agency of the firm of Suter Hartmann & Co., for the sale of Rahtjen's composition in the United States, and, if so, state what has been found?

A. I produce the original document of Mr. John Rathjen, Bremerhaven, dated 15th January, 1878, in which he gives to Suter Hart-

mann & Co. in London the sole sale of his patent composition for the United States of North America.

Complainant's counsel offers in evidence a true copy of the original letter, and a translation of the same into English, and the same is received and marked "Complainant's Exhibit J J."

R. D. Q. 323. State also whether in such examination you have come upon any stencils or copies of stencils used by the firm of Hartmann Brothers before the organization of your corporation, and if so will you produce the same?

A. I have. I hereby produce them.

R. D. Q. 324. Please explain what the separate papers are.

A. The first two are protographs of stencils that were in the possession of Hartmann Brothers before the red hand was
139 registered. The other photos are reproductions of stencils showing the red-hand trade-mark, and the next are stencils of the same.

Complainant's counsel offers the same in evidence and they are received and marked "Complainant's Exhibit K K, 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10," respectively.

Defendant's counsel objects to the reception of the same in evidence on the ground that the same are secondary evidence and on the further ground that it does not appear when the same were made or by whom.

R. D. Q. 325. State whether you have been able to find the original stencils of which these are copies and prints?

A. I have not.

R. D. Q. 326. State as nearly as you can when these photographs and prints were taken?

A. I do not remember.

R. D. Q. 327. State whether or not they are correct representations of the stencils which were used as you state by Hartmann Brothers?

A. They are.

R. D. Q. 328. State whether or not search has been made for photographers' bill for the production of these photographs, and if so whether or not any has been found?

A. Search has been made and no bills have been found.

R. D. Q. 329. You have been asked in cross-examination about certain goods designated as "knotting," it being stated by counsel for defendant that the enquiry was directed to determine whether or not bills or invoices for "knotting" may have been included in the statement of the sales of Rahtjen's compositions to the United States. State whether or not you have again verified these statements of sale, and if so whether or not the sales of "knotting" are included in the same?

140 A. I have verified the statement handed in and I swear that the "knotting" was not included in the sales of Rahtjen's composition.

R. D. Q. 330. You gave in one of your answers in cross-examination the name of the manufacturer of drums used by your firm as

B. Noakes & Co. State whether or not you have had any further investigation made and determined the name of any earlier manufacturer of such drums, and if so state what it is.

A. I have had investigation made and I find that previous purchases had been made of drums from a firm named Miles Druce & Co., of London.

R. D. Q. 331. Enquiry has also been made of you in cross-examination if the early use of Rahtjen's composition sold by your firm was not experimental. If such use was in any sense experimental please explain how and in what manner?

Objected to as not proper redirect examination.

A. The use of Rahtjen's composition at the commencement of our sales was less experimental, so far as my firm was concerned, as it had a good repute already with foreign governments and large steamship lines abroad, but in England with new clients they wished to experiment on their ships and find out for themselves the results of the composition.

Defendant's counsel objects to so much of the witness' answer as is not confined to matters within his own business in England, on the ground that the same is secondary evidence and incompetent.

R. D. Q. 332. Is it not the fact that experimental or comparative tests of other compositions with Rahtjen's compositions have constantly been carried on to your knowledge by different ship-owning companies, not only in early but in later years?

141 A. Yes.

R. D. Q. 333. I read from your cross-examination:

"X Q. 135. When did you first learn that Holzapfel & Co. were making composition for ships' bottoms which they were selling under a name of which the word 'Rahtjen' formed part? A. I do not remember the year."

When you learnt this fact why did you not bring suit against them to prevent such use by them of the word "Rahtjen"?

Objected to as not proper redirect examination.

A. We took legal advice and were told that inasmuch as Rahtjen's patent had expired we had no claim against those who used the name.

R. D. Q. 334. To what patent and to what country do you refer?

Same objection, and as calling for secondary evidence.

A. To England of course, and to the English patent.

Adjourned to 3.30 to the same place.

Recross-examination by Mr. McMASTER:

R. X Q. 335. During the recess have you obtained a copy of the entry which enables you to fix the date when Rahtjen commenced the manufacture of the composition in his new factory in Liverpool?

A. Yes; there are small entries in January, 1874, and a larger amount in October, 1874, for goods supplied to us.

R. X Q. 336. So far as the entry reads it is simply "by goods" such and such an amount, is it not?

A. Yes.

R. X Q. 337. There is nothing in the entry itself to show what those particular goods were?

142 A. Undoubtedly Rahtjen's composition.

R. X Q. 338. Do you mean that in January, 1874, he was manufacturing Rahtjen's composition in the new factory in Liverpool?

A. I cannot state from this small memorandum what they were.

R. X Q. 339. And yet in January, 1874, there are two entries of credits to Rahtjen's account of goods?

A. They are from January, 1874, to September—there are three entries.

R. X Q. 340. And two of those are in January?

A. Two of those are in January.

R. X Q. 341. Now you do mean from these two entries of goods received from Rahtjen in January, 1874, that he was at that time manufacturing this composition in the new factory at Liverpool?

A. He seems to have supplied us then already with small amounts.

R. X Q. 342. You do not know then whether it was October, 1874, or January, 1874, that the composition was made at the new factory in Liverpool?

A. A factory takes several months to build, and there is no doubt it was in the course of construction for several months, but it is evident that in October, 1874, a larger amount was supplied to us.

R. X Q. 343. From that fact alone you judge that that was the date of the completion and working of the new factory?

A. At all events Mr. Rahtjen seems to have started manufacturing in 1874.

R. X Q. 344. But you have not anything to fix the date of the actual beginning of the operation of the new factory of Mr. Rahtjen in Liverpool further than the fact, as I understand you, that during 1874 you find entries of goods credited to him which you had received?

A. Yes.

143 R. X Q. 345. And while you find some of those in January and some in September you find more of them in October and from that you judge that October was the time that the work in the factory was begun. Is that it?

A. I cannot fix the exact date at all.

R. X Q. 346. Then so far as your own knowledge goes it might have been later than October before the factory was in operation?

A. I do not think it was later than October.

R. X Q. 347. But it is possible that it might have been?

A. I do not think so.

R. X Q. 348. Just read me, so that I get it on the record, the entry in October which you have there.

A. "1874, October 1, by goods £65.8.3."

R. X Q. 349. Now read me the three earlier entries to the one you have just given me.

A. "1874, January 14th, by goods account £2.12.0, January 24th, by goods account, £7.0.5, September 21st, by goods account, £4.16.0." All these entries are made to the credit of the account of John Rahtjen, Liverpool.

R. X Q. 350. Is it not possible that these goods with which you credited John Rahtjen were received by you from Bremerhaven and placed to his account so that he might use the money for the purpose of constructing a new factory?

A. I do not think so.

R. X Q. 351. But is it not possible that that might have been so?

A. It is not likely.

R. X Q. 352. Are you positive that it is not so?

A. I cannot think it possible.

R. X Q. 353. While the new factory in Liverpool was building for Mr. John Rahtjen, from where did you receive the composition?

A. We received it in the form of paste from Bremerhaven.

R. X Q. 354. And is it not possible that these entries relate
144 to the receipt of paste which you received from Bremerhaven and with which you credited Mr. Rahtjen in Liverpool?

A. I do not think so, because the John Rahtjen in Bremerhaven would have been credited with it if that were the case.

R. X Q. 355. But if you had been instructed to credit him with this amount for certain purposes, say for building the factory in Liverpool, you would have done so, would you not, or your firm would have done so?

A. I do not think such instructions were given.

R. X Q. 356. Do you remember when your firm first began to use the words "Rahtjen's anti-fouling composition"?

A. From the commencement in 1871—from the commencement of our undertaking the sole sale of Rahtjen's composition for England.

R. X Q. 357. Did you use those words on your stencils?

A. On the labels as well as on the stencils.

R. X Q. 358. Now referring to the photographs and the copies of the stencil plates which you have produced, let me ask you if all of them except the first two in the order in which you have them connected together do not relate to the markings used in connection with the open hand?

A. All except the first two relate to the open hand.

R. X Q. 359. When did you first begin to use the open hand on the stencils or other markings connected with this composition?

A. I think in 1883.

R. X Q. 360. That is about the time that you registered the open hand as a trade-mark?

A. Yes.

R. X Q. 361. You do not know who took these photographs which you have produced in evidence?

A. I do not.

R. X Q. 362. And you do not know when they were taken?

145 A. An entry is found dated 29th of June, 1889, in the petty cash; relating to a payment of six shillings for photographs,

and it seems pretty certain that that entry relates to the photographing of these stencilings.

R. X Q. 363. That was after the Suter Hartmann & Rahtjen's Composition Company was formed, was it not?

A. It was.

R. X Q. 364. Were these photographs taken from the stencil plates themselves, or from what were they taken?

A. Either from the stencil plates themselves or from the markings of the stencil plates on paper or card-board.

R. X Q. 365. You cannot tell which?

A. No, it is impossible to say.

R. X Q. 366. Would the running numbers there assist you in telling whether the photographs were made from the stencils or not?

A. Not at all. I believe the running numbers were taken as they came at random and apparently for the purpose of photographing, because I see here in one "23456."

R. X Q. 367. Were these numbers on the stencils containing the letters forming the balance of the photograph?

A. It is very likely that different stencils were used, some for the numbers and some for the other parts.

R. X Q. 368. Will you swear that barrel heads containing markings as shown on the first one of the set of photographs which you produced were actually used by Suter Hartmann & Co.?

A. I have not the least doubt about it, because the stencils would not have been in use, and we should not have been able to photograph them unless they had been in use.

R. X Q. 369. So that these are photographs from stencils that were actually in use?

146 A. They were.

R. X Q. 370. I suppose that the upper half of the photograph being the first of the series you have produced represents the markings on one side of the cask or barrel or drum, and the bottom half of the photograph represents the marking on the other half of the drum. Is that correct?

A. That is so, I believe.

R. X Q. 371. What is the meaning of the word "priming" as used on your barrel heads?

A. The word "priming" designates No. 1 or the first coating.

R. X Q. 372. That is a preservative coating, is it not?

A. It is.

R. X Q. 373. Is it an anti-fouling coating?

A. No.

R. X Q. 374. Why then in the upper half of the photograph, being the first of the series shown you, do you use the words "Rahtjen's anti-fouling composition" and then under it place the word "priming"?

A. Very likely the stencil has been used for that purpose for photographing.

R. X Q. 375. But used in actual practice?

A. I do not think it would be used in actual practice, because we

should not stencil casks "Rahtjen's anti-fouling composition" and put "priming" on it.

R. X Q. 376. No, as a good business firm you would not stencil it "priming" if it was an anti-fouling composition?

A. Not as a rule. It may be done of course by an oversight at any time.

R. X Q. 377. But these photographs were not taken from actual barrels?

A. They were not taken from actual barrels; they were taken from the stencils.

R. X Q. 378. Now are you not satisfied that the probabili-
147 ties are that no such arrangement of words as shown in the upper half of the first photograph of the series produced was actually used by you in practice—that is "Rahtjen's anti-fouling composition, priming" and then the other words.

A. It may very well be that such a stencilling was used on casks that contained priming. Our principal object was to mark them "Rahtjen's anti-fouling composition."

R. X Q. 379. But you did not mark the casks containing priming "Rahtjen's anti-fouling composition," did you?

A. It may have very well happened.

R. X Q. 380. Were the stencils intended to mark them with those words? Was it your intention in having the stencils made to mark the casks containing priming with the words "Rahtjen's anti-fouling composition"?

A. I doubt very much whether we have had "Rahtjen's priming composition" in stencils; the chances are that we had only these stencils and used "Rahtjen's anti-fouling composition" as forming part of the markings, and that there was put "priming" on a cask which contained No. 1, and that the same stencils were used for casks or drums that contained anti-fouling, and the numbers would then be noted.

R. X Q. 381. That is, you think that in all cases you used the words "Rahtjen's anti-fouling composition," no matter what the cask contained—no matter whether it was priming or anti-fouling?

A. That is very likely.

R. X Q. 382. Is that your recollection as to how you used it?

A. I do not recollect the exact stencillings.

R. X Q. 383. So that you do not know of your own knowledge that stencils were actually used on casks, which stencillings are correctly shown on the upper half of the photograph forming the first one of the series produced?

148 A. These are photographs of the stencillings in use at the time, and it is very likely, as I have said before, that even the casks for priming may have contained the words "Rahtjen's anti-fouling composition" and "priming" put in large type inside.

R. X Q. 384. But do you remember that being done?

A. I do not remember that it has been done, but it is very likely that such a thing has taken place, because here is a case in point that we have actually photographed it. It would be a contradiction, as it were, to have "Rahtjen's anti-fouling composition" and "prim-

ing" in large type inside. There was no trickery at all about it—we did not practice that.

R. X Q. 385. But these photographs, as you have said and as is evident from an inspection of them, are not photographs taken from the actual barrel heads?

A. No, not from the barrel heads, but these stencils were in use.

R. X Q. 386. How much of the words and figures in all embraced in the markings shown in the upper half of this first photograph were contained on one stencil plate?

A. It is impossible for me to say.

R. X Q. 387. Then might it not be that the stencil plates might be so arranged or grouped as to present a photograph of something that had never been used on a barrel head?

A. That is impossible.

R. X Q. 388. Why impossible?

A. It could not be so, because we would photograph stencils that we had in actual use, and it may be that the upper half, "Rahtjen's anti-fouling composition," was one stencil, and the lower part, "Remove head and stir well before use," was another stencil, and "Priming I," or "II," or "III," put inside, formed a third stencil.

R. X Q. 389. But you have no recollection as to what the
149 particular facts were, as to whether the stencils making up the marking on this one head represented on the upper half of the photograph were three stencils, or whether they were two stencils, or whether they were one stencil? You have no recollection with regard to that?

A. No—not stencilling the casks myself I have no recollection of that.

R. X Q. 390. Is it not likely that in making up or grouping the stencilling to form this upper part of the first photograph produced, the stencil containing "priming" was inadvertently used instead of the stencils for marking the three Roman numerals, say?

A. I do not remember a stencil in the round shape of "Rahtjen's priming composition" but I remember distinctly stencils of "Rahtjen's anti-fouling composition," and then we put "priming" or I, II or III, as the case may be, inside the circle.

R. X Q. 391. I am not asking you about any other markings except those contained on the upper half of the first photograph, but I am asking you simply the question whether in grouping and arranging the stencil plates for making the impression which was afterwards photographed, it is not possible that the word "priming" was used inadvertently for the three Roman figures.

A. Yes, it might have been, because here is "Rahtjen's anti-fouling composition," and there is "priming" written across. (Referring to the photograph in question.)

R. X Q. 392. Now, referring to the second photograph of the series produced I assume again that the upper half of that photograph represents the marks to be placed on one end of the keg or barrel or drum. That is correct, is it not?

A. Yes.

R. X Q. 393. And what do the marks on the lower half of
150 that photograph represent? Where were they to be placed—on the other end of the barrel or cask or drum?

A. Yes, on the other end of the cask or barrel or drum.

R. X Q. 394. Would you put the Roman numerals III on both ends of the drum? Was it your practice to stencil them on both ends of the cask or barrel?

A. No, I have no recollection of that.

R. X Q. 395. They were stencilled on one end of the barrel?

A. On one end of the barrel.

R. X Q. 396. And on the other end of the barrel was the running number as I understand?

A. Yes.

R. X Q. 397. Do you not see by an inspection of that photograph that the lower half of that photograph, being the second of the series, represents both ends of the barrel or cask, namely "S. H. & Co. 150 Trieste" which represent the marks to be put on one end of the barrel or cask and below that the three numerals and "Stir well before using" representing the marks to be put on the other end of the barrel or cask? Is not that so?

A. Yes, that is so.

R. X Q. 398. Prior to your commencing the sale of Rahtjen's composition in England and the colonies, do you know of your own knowledge of any steamship company, and if so what, using Rahtjen's composition on their vessels?

Objected to as incompetent at this stage of the examination, the same not being a proper question in recross-examination.

A. Yes, I do, for instance the North German Lloyd.

R. X Q. 399. Do you know any more?

Same objection.

A. Yes, the German government.

151 R. X Q. 400. Do you know of any other steamship company except the North German Lloyd that were using this prior to the time that you began the sale of it in England?

Same objection.

A. I do not remember, as Mr. Rahtjen supplied them from Bremerhaven.

R. X Q. 401. And your knowledge as to this is derived from what Mr. Rahtjen told you, is it not?

Same objection.

A. From what I saw myself.

R. X Q. 402. What, if any, other governments besides the German government was using Rahtjen's composition, if you know?

Same objection.

A. I do not know.

R. X Q. 403. Was it not the Prussian government rather than the

German government that was using Rahtjen's composition at that time?

Same objection.

A. I believe the men-of-war were owned by the Prussian government.

Re-redirect examination by Mr. MERWIN:

R. R. D. Q. 404. Your firm did not buy any goods from John Rahtjen in Liverpool except Rahtjen's composition, did it?

A. No.

R. R. D. Q. 405. The markings in these photographs, "Exhibit K. K.," are made up of a number of different stencils to show those that were used by you, and the way in which they were differently grouped, are they not?

Objected to as leading.

A. Yes.

152 R. R. D. Q. 406. On the second photograph may not the third group at the bottom, consisting of the three numerals, and the words "Stir well before using" in horizontal lines, be stencils used instead of the three Roman numerals, and the half circle "Remove head and stir well before using" at the top?

Objected to as leading.

A. They might have been.

R. R. D. Q. 407. Were you as familiar with the actual practical working at the factory, and the marking of packages as your brothers of the firm of Hartmann Brothers?

A. I was not down there in the factory as frequently as they were.

R. R. D. Q. 408. You are therefore not as familiar with the actual using of the stencils as they would be?

A. I am not.

As requested by defendant's counsel, before closing my deposition, I add the following copy of the first invoices of Rahtjen's composition to Hartmann, Le Doux & Maecker in each of the years of 1897, 1880, 1881, 1882, and "1883" July 30th, 1879. Messrs. Hartmann, Le Doux & Maecker:

"New York	As usual	S. S. 'Victoria'
"	Rahtjen's patent composition.	
"S. H. & Co.		
"26464/73	10 casks I.	
" Gr. 24.1.19 Tr. 4.1.19.	Net 20 cwts.	.....
"26474/93	20 kegs III.	
" Gr. 25.1.12 Tr. 5.1.12.	Net 20 cwts.	.....
		.....
"	10 casks 20 kegs	.....
"	B/l Dk charges	.....
"	Insurance	.....
"	Consul's fee	.....
" * * * * *		* .....

" 16th June, 1880, Messrs. Hartmann Le Doux & Maecker,
" New York as usual S. S. " California '
153 " Paint for ships' bottoms
" S. H. & Co.
" 34344/83 Twenty drums No. I.
" Gr. 23.–.24 Tr. 3.–.24 Nett 20 cwts. .....
" 34364/83 Twenty drums No. III.
" Gr. 23.–.24 Tr. 3.–.24 Nett 20 cwts. .....
" 40 drums .....
" B/L Dk charges .....
" Insurance .....
" Consul's fees .....
" 10th March 1881–Emile Maecker Esq., New York.
" as usual S. S. ' Utopia '
" Paint for ships' bottoms
" S. H. & Co.
" 41688/707 20 drums No. I.
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
" 41708/27 20 drums No. III
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
" 40 drums .....
" Dk. charges B/Lad .....
" Freight .....
" Insurance .....
" Consul's fee .....
" Tare 19 lbs. each drum

* * * * * * *

" 11th January 1882–Emile Maecker, Esq., New York.
" as usual S. S. 'Alsatia '
" Paint for ships' bottoms
" S. H. & Co.
" 807/26 20 drums No. I.
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
" 827/46 20 drums No. III
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
" 40 drums .....
" Dk. charges B/L .....
" Insurance .....
" Consul's fee .....
" Tare 19 lbs. each drum
" 3rd April 1883 M–Emile Maecker, Esq., New York.
" as usual S. S. St. Ronans '
" Paint for ships' bottoms
" S. H. & Co.
" 16710/29 20 drums No 1.
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
" 16730/49 20 drums No. III
" Gr. 23.1.16 Tr. 3.1.16 Nett 20 cwts. .....
154 " 40 drums .....
" Dk chgs B/Ldg .....

" Insurance .....
" Consul's fee .....
" Free on board
"
" Tare 19 lbs. each drum."

I also desire to state that the goods were invoiced after 1879 as "paint for ships' bottoms" instead of "Rahtjen's composition" to conform to the classification of the custom-house at the port of New York.

(By the WITNESS:) I wish also to correct my answer to question 539 in cross-examination, in which I said that I thought we had no other data by which to fix the time when Rahtjen commenced the manufacture of his composition in Liverpool than what I had already stated. I have upon further search found, and herewith produce, copy in English of a letter from Mr. Rahtjen at Bremerhaven dated April 13, 1874, in which he refers to the building of the factory at Liverpool and also copy of an invoice of compositions se-t to our London office dated September 30th, 1874, the original of which has already been shown to defendant's counsel, and which shows that at that date (September 30th, 1874), the factory must have been then completed and running.

"Messrs. Suter Hartmann & Co., London, Bremerhaven, 13 April, 1874. I have the honour to invoice on other side for the goods kindly ordered by your Liverpool firm, for the amount of which £110.1.6, against my draft due 13 August you will please give me credit. Enclosed I beg to hand you B/lad'g for the 10 casks thick paint. 2 casks thick oil invoiced on other side and shipped per S. S. 'Condor' to Hull. Your favour of 11 instant has come to hand, and I shall credit you, after finding them correct, the amounts of your invoices. The measure for the slips for ship lists I did not find in you- esteemed letter. I should be pleased if you would
155 send me a statement of all goods bought for Liverpool, and at the same time a list of stock in store at Liverpool in order to be *in* able to debit you for the part used. As the building in Liverpool at present is not so far finished that the goods can be stored there, I shall have to wait until then, before taking them over. I am pleased that the P. & O. Co. will again make a trial. Yours etc. (Signed) Joh. Rahtjen."

"Liverpool September 30 1874. Bank Hall Lane Messrs. Suter "Hartmann & Co. London.

" Bot. of John Rahtjen
" Terms Conveyance
" 1874 per 'Stromboli'
" Sept. 30 To composition paint
" sent to Havre,
" La Bonde & V 4 Rue
" Anfray
" L. V. 1/3 3 casks composition
" No. 1.

"	1 Gr. 1.3.19. Tr. 0.1.6	
"	2 1.3.13 0.1.2.	
"	3 1.3.17 0.1.6	
"	Gr. 5.2.21 Tr. 0.3.14	.....
"	N. 4.3.7.	
" 4/6	3 casks compos. No. 11.	
"	4 Gr. 1.2.23 Tr. 0.0.27	
"	5 1.3.1. 0.1.1.	
"	6 2.0.6. 0.1.4.	
"	Gr. 5.2.2. Tr. 0.3.4.	
"	N. 4.2.26.	.....
" 7	1 cask composition III	
"	Gr. 2.2.12. Tr. 0.1.6.	
"	N. 2.1.6.	.....
" 8/9	2 drums of composition	
"	II each 1 cwt. Net	
"	2.0.0.	.....
"	7 casks	.....
"	2 drums"	.....

WILLIAM HARTMANN.

156 28TH AUGUST, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

Mr. JOHN RAHTJEN, a witness produced on behalf of the complainant, being first duly sworn, deposes and says in answer to questions propounded by Mr. Merwin, as follows:

Q. 1. Please state your age, residence and business?

A. My age is 53; I am living at Hamburg, Germany; my occupation is manufacturing Rahtjen's composition.

Q. 2. How long have you been engaged in or connected with the business of manufacturing Rahtjen's composition?

A. Since the year 1865, or about so; perhaps we have been making samples before that time but we did not introduce the composition before 1865 or 1866. I could not give the exact year.

Q. 3. How were you first engaged in this business or in what capacity?

A. I was employed by my father Johann Rahtjen.

Q. 4. Where was this business carried on at the time you speak of first being engaged in it?

A. Bremerhaven.

Q. 5. How long prior to that had your father been manufacturing Rathjen's composition if at all?

A. Manufacturing as samples and so only on since 1860 or thereabouts.

Q. 6. Is your father living?

A. No.

Q. 7. When did he die?

A. 1873.

Q. —. Were you engaged in his employ until the time of his death?

A. Yes.

Q. 9. How were you engaged after his death?

157 A. Myself and my brothers became partners together with the widow, my mother.

Q. 10. Under what firm name?

A. As before, "Joh. Rahtjen."

Q. 11. How long did that firm continue?

A. It continues still.

Q. 12. Is your mother still living and a partner?

A. My mother died.

Q. 13. The firm and business then are continued by yourself and brother under the same firm name? Is that the fact?

A. Yes, under the same firm name—under the same style—my brother and myself being the only partners.

Q. 14. Your brother's name is Heinrich?

A. Heinrich.

Q. 15. While you were in the employ of your father, as you have described from 1865 or 1866, until the date of his death in 1873, were your duties such that you were familiar with the business of manufacturing and selling Rahtjen's compositions?

A. Yes, I was familiar from the beginning.

Q. 16. Did you come in contact with, or know personally who the customers for these compositions were?

A. Yes, we had not a large sale at the beginning of our business but it gradually increased.

Q. 17. Please name some of the earlier steamship companies who were customers of your father in the use of Rahtjen's compositions.

A. The North German Lloyd. The German navy.

Q. 18. I show you a package of papers marked "Complainant's Exhibit A," the different documents being numbered 1, 2, &c., respectively. Will you please examine these and state what they are?

A. They are testimonials showing that Rahtjen's composi-

158 tion had been used and that the various companies were satisfied with the results of the composition.

Q. 19. State, if you know, how these testimonials were obtained. Was it in the ordinary course of business, or otherwise?

A. Well, very likely; I cannot say that for certain. Very likely we wrote, or my firm—then in my father's time—wrote to these various people asking them for testimonials and so they gave what we requested.

Q. 20. What did you do with them then; did you retain them or were they turned over to some one else?

A. At the first we retained them; later on we gave them to the English business when that was organized.

Q. 21. Under what firm name was that?

A. Suter Hartmann and Co.

Q. 22. Do you know of your own knowledge whether the vessels and companies referred to in these testimonials were customers of

yours—and by yours I mean your father's and your firm's business afterwards?

A. Yes. They were customers of ours.

Q. 23. Did your father or your firm of "Johann Rahtjen" ever sell the Rahtjen's compositions in the United States, and if so, state when first and for how long.

A. We did not sell any composition to the United States direct but we appointed an agent at New York.

Q. 24. When was this agent appointed?

A. I think it was in 1869 that an arrangement was made with Mr. Henry Gelien of Hoboken, New Jersey.

Q. 25. How was that arrangement made—orally or by letter?

A. By letter. Mr. Gelien wrote. He had very likely heard of Rahtjen's composition and had seen the stuff on the bottoms
159 of the ships, and he wrote to Germany—to Bremerhaven—to ask whether he could obtain the agency.

Q. 26. Have you made any search among your books and papers for the correspondence connected with the appointment of Mr. Gelien as your agent?

A. I have.

Q. 27. Have you found any letters from him, or press copies of letters from you to him on the subject; if so, will you produce what you have?

A. Very little because it is so long ago, and we never thought it worth while keeping all those books. I have some letters. One of them I have here of which I have made a translation.

Q. 28. Will you please take the press copy of letter which you refer to and make a translation of it in English?

A. "Bremerhaven, 19th November 1869.—Mr. Henry Gelien, Hoboken: Confirming my letter dated 1st October, I have to acknowledge receipt yours of date 9th September, in reply to which I have to state that I have not obtained a patent for my composition in America, nor have I applied for one in the United States. I do not think that there is any danger in introducing my composition in America without having a patent, the invention not being of a nature facilitating good imitations. Spurious imitations have already been tried and abandoned. As you are aware my composition is made in two qualities; No. 1 is used as an anti-corrosive on steel and iron and is applied instead of red lead; No. 2 is for the last coating only as it protects the ships' bottoms against the growth of vegetable and animal fouling. If you wish to sell my composition in the United States it can be done under my following conditions: First, the composition is to be sold as 'Rahtjen's composition;' second, I agree to give you the sole sale or agency for the United States, but you shall not introduce or sell any other
160 paint for ships' bottoms, nor an imitation of my composition during such agency; third, my price is to be for composition No. 1, 20 thaler; No. 2, 28 thaler, per cwt. or 100 lbs. German weight, casks included; drums will be charged at cost prices; goods delivered free on board; terms three months; awaiting your early reply, I remain, cordially yours."

I must remark that I have not translated this word for word but that is the meaning of the letter.

Defendant's counsel objects to the letter and the translation of the same in evidence on the ground that the letter appears to be not the original letter but a letter-press copy and therefore secondary evidence; and on the further ground that it appears at best as but a fragmentary part of the correspondence and that the letter to which it purports to be an answer is not in evidence.

Q. 29. By whom is this letter signed and in whose handwriting is it?

Same objection.

A. It is in the handwriting of my brother who is present.
Q. 30. Is the signature in his handwriting?

Same objection.

A. It is.
Q. 31. Have you made careful search for other letters of this correspondence, and if so, with what result?
A. I have found some letters from Henry Gelien, but they only give orders and mention about remittances made. I did not bring them with me.

Defendant's counsel objects to so much of the witness' answer as purports to give contents of letters not produced in evidence.
161 Counsel for complainant consents to the striking out of the matter objected to.

Q. 32. Have you in your possession, or do you know where the original of which this purports to be a letter-press copy now is?
A. The original of this letter is in the hand of Mr. Gelien, I have no doubt.

Defendant's counsel renews his objections heretofore taken as to competency of said alleged letter-press copy.

Q. 33. It is beyond your power and control at present then, is it not?
A. It is.
Q. 34. State whether or not the terms proposed in the letter of which you have produced press copy, were acted upon by Mr. Gelien, and if so, in what way?

Same objection and as leading.

A. They were accepted by Henry Gelien, so far as I remember.
Q. 35. Did Mr. Gelien become the agent of your father?

Same objection and as leading.

A. Yes, he did.
Q. 36. Upon what general terms did he take the agency?

Objected to as calling for secondary evidence and as leading.

A. He received goods and paid for them either in three months' drafts or in cheques on some firms in German towns.

Q. 37. State whether or not the conditions and terms of the agency under which Mr. Gelien acted thereafter were in harmony with the terms of this letter?

162 Objected to as calling for secondary evidence and as leading.

A. They were.

Q. 38. Did this letter then form the basis of the agency business, or serve as an agency contract?

A. Yes.

Q. 39. For how long time did the agency of Mr. Gelien continue for your father and afterwards for your firm?

Objected to as calling for secondary evidence and as leading.

A. From 1870 to 1877.

Q. 40. Have you examined your books and determined therefrom the amount of sales of Rahtjen's compositions made by your father, and subsequently by your firm to Henry Gelien as your agent, during the years 1870 to 1877 inclusive?

Objected to on the ground that no proper foundation or qualification on the part of the witness has been previously shown.

A. I have.

Q. 41. Will you please state the amounts of these compositions furnished by you to Henry Gelien as your agent during the years named?

Same objection as before.

A. In 1870 only five cwt. were used to make samples with. In 1871, 123 cwts. were sent to him, and in 1872, 115 cwt.; in 1873, 308 cwt.; in 1874, 127 cwt.; in 1875, 132 cwt.; in 1876, 65 cwt.; in 1877, 66 cwt. That is as near as I could get the quantities.

Q. 42. Who kept the books in which the entries and records of these sales were made?

A. My father at Bremerhaven.

Q. 43. What individual made the entries, if you know?

163 A. So far as I remember my brother, who is present, or an uncle of mine who was employed in our firm, or the entries were made by myself.

Q. 44. State whether or not you were during the period mentioned accustomed to make entries in the books and familiar with the entries therein.

Objected to as leading.

A. I was.

Q. 45. Have you verified the figures which you have testified to by the original books of account?

Objected to as leading.

A. No, I have only got the value of the goods sent and by those values I can tell as near as possible the cwts. shipped.

Q. 46. Were the sales of which you have testified during those years made in accordance with the terms of the letter, press copy of which you have produced?

Objected to on the same ground as heretofore, taken in reference to the letter-press copy itself and also on the further ground as leading.

A. They were.

Counsel for complainant offers in evidence the letter-press copy produced by the witness and the same is received and marked "Complainant's Exhibit Q."

Objected to as clearly secondary evidence on the ground that the same was not the best evidence and that no effort has been shown to obtain the original letter of which this purports to be a copy.

Q. 47. Do you know of your own knowledge, whether or not substantial sales of Rahtjen's compositions were made by your father, and subsequently by your firm during the years 1870 to 1877 inclusive, to Mr. Gelien as your agent?

Objected to as leading.

164 A. No other sales have been made but what I have stated.

(Question repeated.)

A. I do not quite understand the thing but I have given the answer so far as I know.

Q. 48. Aside from your examination of the books and papers of your firm and of your father, from your familiarity with the business of both in the years named, do you know whether Mr. Gelien did buy of you and your father during those years?

Same objection.

A. He bought those quantities I have named.

Q. 49. Did you from time to time see or know of the orders which Mr. Gelien sent to you, or to your father and to your firm, for these compositions?

Objected to as leading and as calling for secondary evidence unless the orders themselves are produced.

A. Mr. Gelien did not state the names of the firms to whom he sold the compositions.

(Question repeated.)

A. Mr. Gelien sent the orders by letter and these letters I have seen.

Q. 50. So you have personal knowledge of the fact that Mr. Gelien did during these years obtain Rahtjen's compositions from you?

Same objection.

A. I have.

Q. 51. Did you attend to or have knowledge of the shipment of Rahtjen's compositions during these years to Mr. Gelien?

A. Yes.

Q. 52. In what kind of packages were the compositions usually shipped to him?

A. Either in barrels or in casks of about 2 cwt.

Q. 53. Were there any distinguishing marks to show what
165 the contents of these barrels or casks were placed upon the barrels when shipped to him, and if so, what marks or names were applied?

Objected to as leading.

A. The marks were H G and the numbers on one side and on the other side the contents whether No. 1 or 2 and around these I or II "Rahtjen's composition."

Q. 54. How was the name "Rahtjen's composition" placed upon the barrels or casks?

A. So far as I remember they were stenciled.

Q. 55. Was this name applied to these casks during this term of years in the shipments made to Mr. Gelien as the distinguishing mark of the contents?

Objected to as leading.

A. Yes, they were.

Q. 56. Do you know this of your own knowledge?

Same objection.

A. Yes, I have marked nearly all the casks myself with the assistance of my brother.

Q. 57. With the name "Rahtjen's composition"?

A. Yes.

Q. 58. State whether or not you have in your possession any show-cards, circulars, letter-heads or other printed matter of Mr. Gelien's advertising Rahtjen's compositions, and if so will you produce them?

A. I have one show-card which I produce here, and from the several letters with the heading I have one letter here which I produce.

Q. 59. Is there any date or other mark upon the show-card indicating the year in which it was produced?

A. I find there is a mark here, 1872.

Q. 60. Just read it please.

A. "Entered according to act of Congress in the year 1872
166 by Henry Gelien in the office of the librarian of Congress at Washington."

Q. 61. How did you come in possession of this show-card?

A. We wrote to Mr. Gelien for one to have it exhibited in our office—hung up in our office.

Defendant's counsel objects to the answer unless the letter referred to by the witness is produced as that is the best evidence thereof.

Q. 62. You know then as a matter of fact that you received it from Mr. Gelien?

Objected to as leading.

A. Yes.

Q. 63. I notice a long list of references imprinted upon the show-card. State if you know what these are.

Objected to on the ground that proper qualification of the witness to answer such question is not shown.

A. They are firms who used Rahtjen's compositions on their ships.

Complainant's counsel offers the show-card produced by the witness in evidence, and the same is received and marked "Complainant's Exhibit R."

Q. 64. State whether or not the form of letter-head, sample of which you have produced was the one ordinarily used by Mr. Gelien in correspondence with you?

A. It was.

Complainant's counsel offers the letter-head produced by the witness in evidence, and the same is received and marked "Complainant's Exhibit S."

167 Defendant's counsel objects to the introduction in evidence of a letter-head or any fragmentary part of an exhibit as the whole should be offered in evidence or none.

Q. 65. State whether or not Mr. Gelien during the years 1870 to 1877, inclusive, was the sole and exclusive agent and seller of your "Rahtjen's compositions" in the United States?

Objected to as leading.

A. He was.

Q. 66. Was any other party than Mr. Gelien authorized by you to use the trade-mark or trade name of "Rahtjen's compositions" in the United States during those years?

Same objection.

A. Nobody was authorized to use my name or the mark of "Rahtjen's composition" except Gelien.

Q. 67. You have stated that the agency of Mr. Gelien was terminated in the year 1877. Did you appoint or have any other agent or agents succeeding him? If so, who were they?

A. They were Hartmann, Le Doux & Maecker of New York.

Q. 68. State whether or not they were appointed and acted as your sole and exclusive agents.

Objected to as leading.

A. They were.

Q. 69. When did that firm's agency commence?

A. In 1878.

Q. 70. State whether or not you sent to them thereafter as your agents "Rahtjen's compositions."

Objected to as leading.

A. They got "Rahtjen's compositions;" nothing else.

168 Q. 71. Did they get them from you?

A. They got them from me and from Bremerhaven.

Q. 72. How were these compositions marked as compared with those that were sent to Mr. Gelien in respect of the name for the contents of the packages?

A. They were marked the same as to Gelien, the mark on the other side of the cask being S. H. & Co., numbers and destination.

Q. 73. You say the mark S. H. & Co. What do you mean by that?

A. S. H. & Co. is the term of the agents appointed in England. It may be that "S. H. & Co." was not always on those casks, but perhaps "Hartmann Le Doux and Maecker's initials were.

Q. 74. How long did you continue to furnish "Rahtjen's compositions" from Bremerhaven to Hartmann, Le Doux and Maecker?

A. From 1878 to 1879.

Q. 75. About what time in 1879?

A. About six months so far as I remember.

Q. 76. After that do you know from whom they obtained "Rahtjen's compositions"?

A. They obtained the compositions from Suter Hartmann & Co. in London.

Q. 77. Have you in your possession any printed matter in the way of letter-heads, announcements or circulars of Hartmann, Le Doux & Maecker in reference to their agency. If so, will you produce them?

A. I have one here in which they say they have become the sole agents of "Rahtjen's patent compositions" for the United States.

Q. 78. State how you come to have this announcement circular in your possession.

A. It was sent to us to Bremerhaven shortly after it was issued.

Q. 79. By whom?

A. By Hartmann, Le Doux & Maecker.

169 Complainant's counsel offers the document produced by the witness in evidence and the same is received and marked "Complainant's Exhibit T."

Q. 80. State if you know the amount of "Rahtjen's compositions" which you furnished to the firm of Hartmann, Le Doux & Maecker from Bremerhaven during the year 1878 and the first half of the year 1879.

A. In 1878 196 cwt. were sent, and during the year 1879 154 cwt. were sent.

Q. 81. State if you know whether during the years 1871, 1872, and 1873, your father had any agents or consignees for "Rahtjen's compositions" in England, and if so, who were they?

A. They were James Suter & Co. of London. This firm was afterwards altered into Suter, Hartmann & Co. of 18 Billiter street.

Q. 82. Did you ever manufacture "Rahtjen's compositions" in England, and if so, commencing about what date and continuing for how long?

A. I made the composition in Liverpool; I erected a factory there in the year 1873, I think.

Q. 83. Down to what time did you continue to manufacture "Rahtjen's compositions" in England yourself?

A. Up to 1878 in Liverpool, and then from 1878 to 1880 in London.

Q. 84. Who were your consignees or agents in England during that period, and state whether or not they were exclusive agents for Great Britain?

A. Suter, Hartmann & Co. were the exclusive agents.

Q. 85. Who succeeded you in the manufacture of "Rahtjen's compositions" in England?

A. Hartmann Brothers.

Q. 86. You have now testified to business transactions with three different firms in all of which the name of Hartmann ap-
170 pears: Suter, Hartmann & Co., Hartmann, Le Doux & Maecker, and Hartmann Brothers. State if you know who was the Hartmann of Hartmann, Le Doux & Maecker?

A. So far as I know Mr. William Hartmann was the partner of Hartmann, Le Doux & Maecker.

Q. 87. Where is that gentleman now?

A. He is here present.

Q. 88. Who was the Hartmann of Suter, Hartmann & Co.?

A. It is the same Mr. William Hartmann and two brothers of his.

Q. 89. Who was or who were the Hartmann or Hartmanns of Hartmann Brothers?

A. They were the identical persons Hartmann Brothers.

Q. 90. For how long a time, if you know, did Hartmann Brothers carry on the manufacture in England of "Rahtjen's compositions"?

A. From 1880 until the present company of Suter, Hartmann & Rahtjen's Compositions Co., Ltd., was founded.

Q. 91. State whether or not your firm of "John Rahtjen" transferred to Hartmann Brothers any right to the use of the trade-mark or trade name of "Rahtjen's composition," or the good will of the business in England?

Objected to as leading, and as calling for secondary evidence.

A. All rights to the name of "Rahtjen" were transferred to the firm of Hartmann Brothers.

Q. 92. State whether or not any royalty was paid by Hartmann Brothers for the use of the name "Rahtjen's composition"?

Objected to as leading and as calling for secondary evidence.

A. Yes, royalties were paid and received by me.

Q. 93. For how long a period were royalties paid to you by Hartmann Brothers?

171 Same objection.

A. Until the year of the foundation of the corporation of the new company, Suter Hartmann & Rahtjen's Composition Co.

Q. 94. Did these royalties during those years amount to a substantial sum?

A. Yes; they did.

Same objection.

Q. 95. After the organization of the corporation, Suter Hartmann & Rahtjen's Composition Co., Ltd., in the year 1888, who, if any one, carried on the manufacture in England of "Rahtjen's compositions"?

Objected to on the ground that no proper foundation had been laid for the question, nor the qualification of the witness to testify thereto been shown.

A. The said firm of Suter Hartmann & Rahtjen's Composition Co.

Q. 96. Did any one else by your authority carry on such manufacture?

A. No.

Q. 97. Did your firm receive any royalties from that corporation for the use of the name "Rahtjen's composition"?

A. No.

Q. 98. What, if anything, in lieu of royalties did you receive at any time?

A. I received shares; I became a stockholder I think you call it in English.

Q. 99. You received shares in what?

A. In the said company.

Q. 100. State whether or not you continue to be a stockholder in the corporation?

A. Yes; I am a stockholder and a director of the company.

Q. 101. Have you been such continuously since the organization of the company?

172 A. Yes; I have been.

Q. 102. Do you know the corporation in the United States known as "Rahtjen's American Compositions Company"?

A. Yes.

Q. 103. State whether or not you are a stockholder in that?

A. I am.

Q. 104. State, if you know, whether your partner, Heinrich Rahtjen, is a stockholder in either of the said corporations?

A. He is a stockholder in both corporations.

Q. 105. After the middle of the year 1879, state, if you know, who furnished Hartmann, Le Doux & Maecker with "Rahtjen's compositions" in the United States?

A. The firm of Suter Hartmann & Co., of London.

Q. 106. Then, if I understand you, during the year 1878 and the first half of 1879 "Rahtjen's compositions" were furnished to Hartmann, Le Doux & Maecker in the United States by your firm direct from Bremerhaven?

A. Yes.

Q. 107. After the middle of the year 1879, Hartmann, Le Doux & Maecker were furnished with these compositions by the firm of Suter Hartmann & Co., of England?

A. They were.

Q. 108. And from the year 1880 to the year 1888 Rahtjen's compositions were manufactured by Hartmann Brothers in England for Suter Hartmann & Co.?

A. Yes; they were.

Q. 109. And consequently during the last-named years the three firms of Hartmann Brothers, Suter Hartmann & Co., and Hartmann, Le Doux & Maecker, had the exclusive right of use from you as manufacturers, and consignees and agents, of compositions
173 for ships' bottoms under the name "Rahtjen's composition" in England and the United States?

A. They had.

Objected to so far as calling for secondary evidence, if it shall appear hereafter that there is any written grant or conveyance of such rights to said parties.

Q. 110. To recapitulate, and to some extent repeat what has already been questioned and answered, did any one in the United States during the years 1870 to 1877 actually act as the exclusive agent or agents of your father and afterwards your firm, in the sale of "Rahtjen's composition," and in the use of that trade name; and, if so, give the name or names?

Objected to as leading.

A. We had no other agents but Henry Gelien in the beginning, and later on Hartmann, Le Doux & Maecker. Besides these firms no one had the right to use the name of "Rahtjen."

Q. 111. And their respective agencies during the period you have stated were or were not continuous in the use and sale of "Rahtjen's composition"?

Objected to as leading.

A. Yes. They were continuous.

Adjourned until half past two at the same place.

(After adjournment examination resumed.)

Q. 112. State whether or not the use by Suter Hartmann & Rahtjen's Composition Company, Ltd., and Rahtjen's American Composition Co., of the trade-mark or trade name "Rahtjen's composition" in their business in Great Britain and the United States has been with the consent of your firm?

Objected to as leading, and as also calling for secondary evidence.

174 A. Yes, it has been.

Q. 113. State whether or not your firm has during the existence of these corporations interfered or competed with them in the

sale or use of "Rahtjen's compositions" in England or the United States?

A. Not that I know of.

Q. 114. You have not then done it intentionally?

A. No.

Q. 115. And so far as you are concerned, their use of that trade name has been exclusive?

A. Yes, exclusive.

Q. 116. State whether or not the trade-mark or trade name of "Rahtjen's composition" had any value prior to November, 1873?

A. In my opinion it had a great value.

Q. 117. Who gave it that value?

A. My compositions were looked for and there were many buyers and many people applied for agencies.

Q. 118. What was the reputation of that composition in the trade?

A. It was a very good one.

Q. 119. I read from the direct testimony of Mr. Max Holzapfel in this case:

"Q. 54. Has any one else at any time other than the present complainant sued you or your firm or the present defendant company for using the said name 'Rahtjen's'? A. Yes. Mr. John Rahtjen sued us in Hamburg once. Q. 55. And in that suit were you enjoined or restrained from using the word 'Rahtjen' as part of the name to describe the composition manufactured by you or your firm or the present defendant? A. The judge held that no one could restrain us from using the words 'Rahtjen's composition.'"

State whether or not this last answer is a correct and truthful statement of that matter?

A. In my opinion the statement is not true.

Q. 120. State briefly what the character of that suit was and what occurred at the hearing of it.

175 Objected to as calling for secondary evidence, as a certified copy of the decision of the court would be the best evidence of the matters enquired about.

A. I could not grasp a single item out of the thing; I have to go a little into the matter then. I heard that the firm Holzapfel at Hamburg had introduced a lot of composition marked "Genuine Rahtjen's composition." I applied to the public prosecutor who sent an officer to the shop, or whatever you call it, of Holzapfel's, and seized what was left of this composition marked as stated.

Defendant's counsel objects to the preceding answer as wholly inconsistent on the ground that it is secondary evidence, and gives notice that on the hearing he will make a motion to strike out and expunge the same from the record.

Q. 121. What was the decision of the court in this proceeding?

Same objection and notice.

A. The decision of the court was not given in writing so far as I know, because I have not got the judgment, but the public prose-

cutor gave a verdict of 500 marks or imprisonment against Holzapfel's. This verdict was withdrawn because it was thought that Mr. Holzapfel had lived too long outside Germany, and not knowing the German law about trade-mark.

Q. 122. Was there any decision by the court to the effect that no one could restrain Holzapfel from the use of the words "Rahtjen's composition"?

Same objection and notice.

A. That restraint lies in the judgment.

Q. 123. Then that statement of Mr. Holzapfel is not true?

A. No, it is not true.

176 Q. 124. State if you remember where the office of Suter Hartmann & Co. was located when they became the agents for "Rahtjen's composition" in England?

A. It was at Basinghall street under the firm of James Suter in the beginning, and then 18 Billiter street under the firm of Suter Hartmann & Co.

Q. 125. Do you remember how long it was you dealt with James Suter & Co.?

A. It was a very short time.

Q. 126. Do you remember about when it was that Suter Hartmann & Co. commenced the agency?

A. It was almost immediately after they got the agency from us, I could not say the exact date.

Q. 127. The office was then first at Basinghall street, and later at Billiter street?

A. Yes.

Cross-examination by Mr. McMaster, subject to the objections heretofore taken and without waiving the same:

X Q. 128. You say, as I understand you, that you marked the barrels and casks containing the "Rahtjen composition" for shipment in the year 1871 and thereafter to the middle of 1879. That is correct, is it not?

A. Yes, I have said that. I have marked them not alone, but with the assistance of my brother. When I left for England my brother took the marking.

X Q. 129. When did you leave for England?

A. 1873.

X Q. 130. From 1871 up to 1873 you attended to the marking or stencilling of the barrels and casks containing the composition?

A. Yes.

X Q. 131. Do you know where the stencil is with which you did that marking?

A. It is so long I do not know.

X Q. 132. When do you think you last saw it?

177 A. When I left Bremerhaven.

X Q. 133. In 1873?

A. In 1873.

X Q. 134. Have you made any effort to find the old stencil with which this marking was done?

A. No, I have not.

X Q. 135. Do you know whether or not your firm still has it among its archives or belongings?

A. No, it has not.

X Q. 136. How do you know that?

A. Because when I left there were no exports to England. I made the stuff in Liverpool and supplied it direct here without using those old stencil plates.

X Q. 137. But what was done with those old stencil plates; were they left in possession of the firm?

A. Yes, of the firm of Bremerhaven.

X Q. 138. And you have had no search made there to see whether those stencil plates are still in possession of the firm or not?

A. I have not, but they having become of no value and of no use I suppose are done away with.

X Q. 139. Yes, but you do not know of your own knowledge?

A. I do not know.

X Q. 140. When you commenced the manufacture of this composition in Liverpool, how did you stencil it—with stencils in all respects like those that you had used in Bremerhaven?

A. Well, some were made of paper—stencils which we cut out ourselves, and some were made of zinc, which were made by proper stencil-makers.

X Q. 141. Do you remember the name of the stencil-makers?

A. I do not.

X Q. 142. Have you among your papers or the firm's papers any bills or receipts for those stencils?

A. I do not think so, they were made and paid for when taken away.

178 X Q. 143. In what respects, if any, did the lettering on the stencils which you had cut in Liverpool differ from the stencils which you had previously used in Bremerhaven?

Objected to by counsel for complainant as not proper cross-examination, and because irrelevant, incompetent and immaterial.

A. I have always avoided to make any difference.

X Q. 144. Did they contain the same initials?

Same objection.

A. So far as I remember, yes.

X Q. 145. What became of those stencils when you ceased to use them?

Same objection.

A. They became the property of Hartmann Brothers, my successors.

X Q. 146. Have you made any efforts to find if those stencils that you used in Liverpool are still in existence?

Same objection.

A. No. These stencil plates only last a short time and when broken they are thrown away.

X Q. 147. You have not seen the stencils according to your own testimony for a long period of time. Are you positive that the words "Rahtjen's composition" appeared on the stencils which you used in Bremerhaven and in Liverpool?

Objected to for the same reasons as before stated so far as relates to stencils used in Liverpool.

A. I have always taken care that the name "Rahtjen's composition" was on every cask.

X Q. 148. And on the stencils—cut in the stencils.

Same objection.

A. Yes—stencilling it on the casks.

179 X Q. 149. Was that equally true of the casks which were filled with this composition in Hamburg?

Same objection.

A. Yes, but we did not stencil all of them. Some of them have the paper label pasted to them.

X Q. 150. But the paper label contains the words "Rahtjen's composition"?

A. Yes, always.

X Q. 151. Have you looked to see whether you could find one of the paper labels which you say you sometimes used on these casks?

A. Well, we have thousands of them in stock for that purpose. I need not look for them at all.

X Q. 152. And you have had them in stock how long?

A. Since I went back to Germany—since 1880.

X Q. 153. Prior to 1880 the marking on the casks was done solely by stencil?

A. Either by stencilling or putting a label on with Suter Hartmann's signature—"None genuine without the signature," and so on. I got those labels from Suter Hartmann & Co. and they were fastened to the casks.

X Q. 154. But while you were in business in Germany before you came to Liverpool, all the marking was done by stencilling as I understand it?

A. By stencilling.

X Q. 155. And after you came to Liverpool and started the manufacture of this composition there you did all the marking at that time by stencilling?

A. Stencilling and labelling.

X Q. 156. Both?

A. Yes, both.

X Q. 157. In Liverpool?

A. In Liverpool.

X Q. 158. Are the labels as they are used today identical in language and so on with the labels that were first used when you came to Liverpool?

180 A. No, the labels used in Germany are in the German language and we do not require that remark, "None genuine without Suter Hartmann & Co.'s signature."

X Q. 159. As I understand you, in Liverpool when you were making and selling this composition you sometimes put a label on the barrels instead of stencilling?

A. Not I myself, but my workmen did.

X Q. 160. Can you produce one of those labels?

A. I have not got one here. (Witness searched among documents.) No, it is not here. I have seen one—I have had one in my hands.

X Q. 161. What was on the label when you first commenced to use it in Liverpool?

A. It was only a caution so far as I remember, to caution buyers against imitations.

X Q. 162. What was the phrascology as near as you can remember?

A. "None genuine without the signature" I remember, then "Suter Hartmann & Co." was underneath it.

X Q. 163. Did the words "Rahtjen's composition" appear on the label?

A. Well, I could not say, but I am almost certain it did, otherwise that label would not have any value.

X Q. 164. But you do not remember?

A. No, I do not remember it.

X Q. 165. What year did you begin to use the paper label in Liverpool?

A. I think it was soon after I started making the paint in Liverpool.

X Q. 166. Within the first year?

A. I could not exactly say, I believe so.

X Q. 167. At the time that you began to use the paper label in Liverpool, did you begin to use the paper label on the goods manufactured and sold abroad in Germany?

A. I do not remember; I do not think so.

181 Defendant's counsel objects to the testimony in regard to stenciling and also in regard to the paper labelling on the ground that the same is secondary evidence, and that proper foundation for the introduction of secondary evidence has not been shown.

X Q. 168. Is your recollection or memory in regard to dates and events pretty reliable?

A. I am sorry to say not.

X Q. 169. Are you positive that it was 1873 that you came over to Liverpool and embarked in the manufacture of this composition there?

A. It may be 1874; I do not remember for certain.

X Q. 170. Could it have been 1875?

A. No.

X Q. 171. Why not? What fact have you in your mind that satisfies you it could not have been 1875?

A. Because I was more than six years, or at least six years, in England. I spent six years in England.

X Q. 172. You left England at what time?

A. 1880.

X Q. 173. Do you remember when you commenced the manufacture in Liverpool whether you hired any premises?

A. I hired premises—premises were built for me.

X Q. 174. Who built them?

All of this is subject to objection as incompetent, irrelevant and immaterial.

A. An iron works, Jack Rollo & Co. of Liverpool.

X Q. 175. How long were you in Liverpool before you actually began to make the composition?

Same objection, and further that it is not proper cross-examination.

A. I was in Liverpool several times before I finally settled there. Meanwhile the factory was built.

182 X Q. 176. And about what time was it that the factory was built and that you began the manufacture in Liverpool?

Same objection.

A. I do not remember that date.

X Q. 177. Are you positive that that was in 1874?

Same objection.

A. I cannot tell you the date.

X Q. 178. Are you positive that it was earlier than 1875?

A. So far as I remember, yes.

X Q. 179. Are you positive that work on the factory had begun in the fall of 1874?

Same objection.

A. I should have to refer to my books which I have not here. I cannot say.

X Q. 180. If as a matter of fact work had not been begun in the fall of 1874 could you have manufactured this composition in Liverpool before 1875?

Same objection.

A. Yes. We sent from Bremerhaven composition into England to Suter Hartmann & Co. ready made at Bremerhaven. This composition containing spirits of wine was stopped at the customs-house by the customs officers, as the duty was very high. We then sent composition in paste to Liverpool and had it mixed up with liquids bought at Liverpool. That I should call manufacturing of the composition.

X Q. 181. Was that done by you?

A. I have been over to Liverpool frequently conducting the dissolving and mixing of the stuff, but not always; it was chiefly done

under the superintendence of my agent, or at least the agent of Suter Hartmann & Co. at Liverpool, Mr. Le Doux.

183 X Q. 182. And when you came over to Liverpool it was with the object of starting the manufacture there, was it not?

A. Yes.

X Q. 183. Now, if as a matter of fact the work on the factory was not begun before the fall of 1874, could you manufacture it in that factory before 1875?

A. Not before 1875 that I remember. I should have to refer to my books to tell, but I have not got them here; they are at Hamburg.

X Q. 184. You say that your way of fixing the date when you came to Liverpool is by the fact that you remained in England six years?

A. Yes, about six years.

X Q. 185. And that you returned to Germany in 1880? Can you not refresh your recollection now by remembering how long you were in Liverpool before you actually begun the manufacture in the factory of this composition?

Same objection.

A. Well, as I have said, I have been in Liverpool several times before the factory was built, and when the factory was ready it only required a short time to commence. Everything was done in the meantime. I could not give the exact date.

X Q. 186. Do you still think you began the manufacture in that factory in 1874?

A. In 1875.

X Q. 187. You think in 1875?

A. Yes. With my counsel's permission I could give you the exact date from my books as soon as I get back to Hamburg, if stress is laid upon it.

X Q. 188. Have you made any effort to see if the letter from Henry Gelien to you, or from you or your firm to him in reply, is still in existence?

A. There are several copies of letters to him and a few from him.

X Q. 189. But only those that you have produced?

A. Of which I produce one.

184 X Q. 190. Are there others that you have not produced?

A. Yes, there are some which I have not produced, but which are simply orders or stating, "Herewith remittances of so and so."

X Q. 191. You have referred in your testimony to a letter from Gelien to you dated January 27th, 1877. That letter purports to be an order, does it not, for certain barrels or casks of composition paint.

Objected to by counsel for complainant for the reason that the letter in question is not in evidence in the case, that the printed, or lithographed letter-head only is in evidence as an exhibit showing

the trade-mark used by the agent Gelien; therefore all questions as to the contents of the document appended to this are incompetent, irrelevant and immaterial, and improper cross-examination.

A. It is an order.

X Q. 192. Please translate so much of the letter as refers to the order.

Same objection, and it is further noted by counsel for complainant that if counsel for the defendant desires this matter injected into the case it must be by introducing the same as a part of the case of the defendant, and subject to cross-examination on behalf of the complainant, and that unless so done counsel for complainant will move the court at the hearing of the case that all testimony drawn out by these questions shall be struck from the record.

A. "January 27th, 1877.—To Mr. John Rahtjen, Bremerhaven: After you receive these lines I should like you to send me by the first Bremen steamer for my account one cask No. 0, two
185 casks No. 1, eight casks No. 2, and two casks No. 3, altogether 12 casks composition, and one cask fluid, as already formerly received."

X Q. 193. That is the order?

A. That is the order.

X Q. 194. Do the words "Rahtjen's composition" or the word "Rahtjen" appear anywhere in the written context of that letter?

Same objection and notice.

A. They do not appear, but the heading of the letter says to what it refers. I may add that Gelien received nothing but "Rahtjen's composition" from me.

All of the answer after the words "They do not appear" objected to as not responsive.

Counsel for complainant notes that while the entire line of questioning is wholly incompetent, irrelevant and immaterial, the witness is entitled to fully answer and explain the matters enquired about, and that if one part is permitted to remain in the record, it is the right of the witness and of the complainant that all should remain.

X Q. 195. Have you any written orders from Gelien for your composition in which the word "Rahtjen" appears?

Same objection.

A. It is never found necessary to write that. It was a matter of fact that whenever Gelien ordered paint it was "Rahtjen's composition."

X Q. 196. But as a matter of fact he did not write out the word "Rahtjen's" or "Rahtjen's composition" in the body of the letter?

Same objection.

A. No, he knew that he would only get Rahtjen's.

186 All of the answer after the word "No" objected to as not responsive, and as incompetent and immaterial.

X Q. 197. What has been your practice or the practice of your firm in keeping letters or copies of letters or copies of invoices and the like in the course of your business?

A. Books and letters have been kept for many years; at least 10 to 15 years, but when thought that they became obsolete and worthless they were destroyed.

X Q. 198. Have you got any copies of invoices for this composition which were sent to Gelien?

A. I have not.

X Q. 199. And your firm has none?

A. Not that I know. I have not been able to trace.

X Q. 200. Have you made any effort to see whether the original invoices or original letters which were sent by you or your firm to Gelien are still in existence or preservation?

A. That of course I do not know.

X Q. 201. You have made no effort to ascertain that?

A. No, I did not.

X Q. 202. How was the agency with Gelien made? In writing or otherwise?

A. By correspondence.

X Q. 203. You have not produced any letter from Gelien in regard to the agency, have you?

A. No.

X Q. 204. Are there such letters in your possession or in the possession of your firm?

A. I do not think so; I should have found them if there were.

X Q. 205. What were the terms of the agency? Did Gelien have to make returns to you of the amount of composition sold?

A. No, he bought for his own account.

187 X Q. 206. And you do not know of your own knowledge what disposition he made of it?

A. I do not.

X Q. 207. You do not know of your own knowledge under what name he sold it or invoiced it to his customers?

A. He was bound to use the name "Rahtjen's composition." Whether he has done so in every instance I cannot trace, but I believe he has because the name of "Rahtjen's composition" was the name under which the paint was readily sold.

X Q. 208. Have you any knowledge of any instance in which Gelien sold the composition which he received from you under the name of "Rahtjen's composition"?

A. I have not.

X Q. 209. I have asked you whether you have had any orders from Gelien in which the word "Rahtjen's" or the words "Rahtjen's composition" appeared in the context of the letter, and you said no. Have you any letters or other documents or papers from Gelien in which the word "Rahtjen" or the words "Rahtjen's composition" appear or appears?

A. He never stated that he wanted exactly "Rahtjen's composition," but as a matter of fact he did not get anything else but "Rahtjen's." No, I do not think there are any left. I have a few letters, but as I say they only refer to orders and remittances.

X Q. 210. In which the word "Rahtjen" does not appear as part of the context of the letter itself?

A. The name "Rahtjen" does not. He does not write the name of "Rahtjen"—no. The documents are the show-cards and testimonials.

X Q. 211. Have you any invoices or copies of invoices of shipments of this composition to Hartmann, Le Doux & Maecker, the successors?

A. I have not.

X Q. 212. And your firm has not?

A. No, not that I am aware of.

188 X Q. 213. Have you looked to see if there were such invoices in question or copies of such invoices?

A. Not with reference to the firm of Hartmann, Le Doux & Maecker. I only searched for Gelien's.

X Q. 214. You have given me the amounts of this composition which you say were shipped to the United States in certain years. During the years 1871, 1872 and 1873 who made the entries in the books of your firm?

A. It was done by myself, my brother, or my uncle, who was also in our employ.

X Q. 215. Do you remember whether any of the entries concerning the shipments of this composition to America are in your handwriting; and if so, what ones?

A. They are some in my handwriting I know, and some in my brother's handwriting, but I do not know to which they refer.

X Q. 216. Can you give me the dates of shipments to Gelien in 1871 of this composition?

A. I cannot.

X Q. 217. Or in 1872?

A. I could, but the books are at Bremerhaven.

X Q. 218. You can give me no dates of shipments for any of these years up to and including 1877?

A. No. When received they were executed always by the next boat—the next steamer going to New York.

X Q. 219. Do you know whether these shipments during those years from 1871 to 1877 inclusive to Gelien embrace more than one shipment or consignment a year?

A. Yes, they did; each shipment consisted of various lots.

X Q. 220. And there was more than one shipment a year?

A. Yes, of course.

X Q. 221. But you can give me no particulars as to the dates of those shipments or by what vessels they were sent?

189 A. I cannot at present.

X Q. 222. And as I understand your testimony, you have simply estimated the amounts of the shipments for those years from the amount of money remitted to you by Gelien?

A. Yes.

X Q. 223. Did not your books show the amount of composition sent to Gelien?

A. Oh, yes.

X Q. 224. Why was it not as easy to obtain from your books the amount of composition sent for each year, as it was to collate the amount of remittances and to then compute from that the amount of composition sent?

A. Quite as easy, but I thought that only the amount might be required, and not the quantities.

X Q. 225. Do you consider the computation of the amount based on simply the amount of money received as reliable and accurate?

A. Not quite.

X Q. 226. Were there different prices for the different numbers of the composition?

A. Oh, yes.

X Q. 227. And the amount of money remitted as you have it there would not indicate which number it was?

A. Generally it was 1 and 2 or 1 and 3—not always in like proportions—but about.

X Q. 228. You do not then mean it to be understood that these amounts which you have given for the different years are absolutely correct?

A. The money amounts are correct, but the weights are not quite correct.

X Q. 229. But you have not given the money amounts, have you, in giving your testimony—only the amounts and weights?

A. I have got the exact amounts—the money amounts. I have only given the weights, but I can give the money amounts.

190 X Q. 230. Did your firm in the early days of the manufacture and introduction of this composition have show-cards or letter-heads or the like?

A. No, not in the early days.

X Q. 231. Did you do any advertising in those early days?

A. Not in the early days.

X Q. 232. When did you first have any show-cards or letter-heads?

A. I could not tell.

X Q. 233. At some period, however, you did begin to have letter-heads and show-cards?

A. Yes. This is a circular we issued now and then. (Producing printed document.)

The defendant's counsel offers in evidence the circular produced by the witness in giving his last answer and the same is marked "Defendant's Exhibit Rahtjen's Circular."

Complainant's counsel objects to the introduction of the circular in question because counsel for the defendant has obtained it without the permission of the witness, and it is not the property of the defendant's counsel or of defendant, and he has no right or control over the same, and further because it is incompetent, irrelevant and immaterial, and still further because the defendant's case has been

closed and he cannot now introduce new evidence, and motion will be made at the trial of this case that the same shall be struck from the record.

X Q. 234. You have no objection to my putting in evidence that circular of yours, have you?

A. If my counsel permits, all right.

X Q. 235. By your counsel you mean Mr. Merwin, here present?

A. Yes, I have no other counsel.

191 Counsel for complainant objects to the competency, relevancy and materiality of the would-be exhibit, and it must be received only subject to all objections heretofore made thereto, but counsel states that he has no objection to it other than the legal grounds of objection thereto. At the request of complainant's counsel defendant's counsel consents that the said exhibit shall remain in the custody of complainant's counsel up to the hearing of the case, subject, however, to the right of inspection by defendant's counsel at all reasonable times.

X Q. 236. You have referred to the grant of the right to use the word "Rahtjen" or the words "Rahtjen's composition" to James Suter, and subsequently to Suter Hartmann & Co. Was that agreement in writing?

A. Not with James Suter & Co.

X Q. 237. Was it in writing with Suter Hartmann & Co.?

A. Yes, it was. The first agreement that was made was with Suter Hartmann & Co.

X Q. 238. What documents, if any, were executed between you and Suter Hartmann & Co.?

A. There was no document; that agreement was made by correspondence.

X Q. 239. Can you produce the correspondence relating to the grant of the right to use the name "Rahtjen" or "Rahtjen's composition"?

A. I cannot.

X Q. 240. Is that correspondence in existence?

A. I do not know.

X Q. 241. Have you looked for it and made any search for it?

A. I have not.

X Q. 242. What paper was it that you produced in giving your answer that the agreement was in writing?

192 Complainant's counsel objects to the question because it presumes or assumes that the witness did produce a document which was not the fact, no document having been produced by the witness but he was simply examining the papers before him, after which he stated that there was no agreement with Suter Hartmann & Co., and the witness is instructed by his counsel that he need not answer the question if it pertains to other matters of business or is a disclosure of any business transaction in no way connected with this suit, which is the fact.

A. Having several agreements before me I mistook the assignment of letters patent for the written agreement with Suter Hartmann & Co.

X Q. 243. The assignment of what patent?

Same objection.

A. The assignment of Heinrich Rahtjen's patent.

X Q. 244. That assignment was made at what time?

(Counsel for complainant instructs the witness that he need not answer the question, because it is wholly incompetent, irrelevant and immaterial, and he can, may and should decline to answer it as pertaining to business matters outside this case.)

Defendant's counsel objects to the instructions to the witness.

A. I decline to answer the question under the advice of counsel.

X Q. 245. Did you ever have any agreement in writing with Hartmann Brothers in regard to the Rahtjen composition or its name?

A. Yes, I have.

X Q. 246. Can you produce that agreement?

A. No, that is the only one of all these I left at home—I left at Hamburg. I did not know it might be wanted.

X Q. 247. You will produce that agreement before formally closing your testimony?

193 A. Yes; with the advice of my counsel.

(Adjourned to 29th August at 11 o'clock a. m. to the same place.)

29TH AUGUST, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Cross-examination of Mr. JOHN RAHTJEN resumed:

X Q. 248. You have testified in your direct examination that you are a stockholder in the American Company, the complainant in this suit. Does your name appear among the list of stockholders of that company, and, if so, when first did it so appear?

Objected to as incompetent, irrelevant and immaterial.

A. It is sure to be on the list, and since the company was founded.

X Q. 249. Have you got a certificate of stock issued by the American Company to you?

Same objection.

A. It may be. I do not remember it.

X Q. 250. Is not your interest in the American Company an indirect one—that is to say, is not the stock in which you are interested owned by Suter Hartmann & Raht-en's Company, Ld.?

A. In both ways.

X Q. 251. That is you have, as you understand, stock standing in your own name in the American Company, and you are also interested as a stockholder in Suter Hartmann & Rahtjen's Company,

Limited, which in turn is a stockholder of the American Company?

A. Yes.

X Q. 252. Did the firm of Hartmann, Le Doux & Maecker ever publish or issue a show-card for this Rahtjen's composition?

194 A. I do not remember. They have got on their letter a heading showing a steamer representing the "Great Eastern," above the steamer are the words "Rahtjen's patent composition for ships' bottoms," and at the bottom, "Hartmann, Le Doux & Maecker," and it is very likely they have got it on a show-card as well.

X Q. 253. Have you any recollection of seeing such a show-card produced by Hartmann, Le Doux & Maecker?

A. I have not.

X Q. 254. Was it the practice of your firm to get copies of show-cards issued and used by the agents of your firm?

A. No; the agents got the show-cards made for themselves on their own account.

X Q. 255. And your firm did not ask for copies of these cards?

A. Yes; we did.

X Q. 256. And in instances where you asked for it you generally received copies of the cards?

A. Yes; we always got one or more.

X Q. 257. You have not looked among the documents and papers and so on of your firm to see whether you have a show-card issued by Hartmann, Le Doux & Maecker?

A. I have not.

X Q. 258. Did you and your associates bring a suit in 1886 in Brussels against William Wright for infringement of your rights to the word Rahtjen as a trade-mark or a trade name?

Objected to as incompetent, irrelevant and immaterial, and any testimony adduced of this character, complainant's counsel will move to strike from the record at the hearing of the cause, notice of which is hereby given.

A. No; we did not.

195 X Q. 259. Did you bring a suit against William Wright in 1886 in any court?

Same objection and notice.

A. No.

X Q. 260. Did you bring a suit against any person or corporation in 1886 involving the right to use the word "Rahtjen" as a trade-mark or trade name or the like?

Same objection and notice.

A. I do not think so.

X Q. 261. Look at the little circular, being the Defendant's Exhibit Circular of London Oil & Color Company of 1886, and state whether or not you ever saw such a circular as that before?

Same objection and notice.

A. I have not seen this circular, but I saw another one like it.

X Q. 262. Does that refresh your memory in regard to any suit which you and your associates brought against the London Oil & Color Company or William Wright, its manager, or both, in 1886?

Same objection and notice.

A. No.

X Q. 263. Do you know what suit is referred to in that circular of the London Oil & Color Company, the defendant's exhibit shown to you?

Same objection and notice.

A. I presume it is a suit brought by my London agency against these people.

X Q. 264. Did you ever hear of such a suit being brought?

Same objection and notice.

A. I believe I heard of it, but I am not quite certain.

196 X Q. 265. Did you ever see a copy of the decision in that suit?

Same objection and notice.

A. What suit, please?

X Q. 266. The suit just referred to, the suit brought by your agents against the London Oil & Color Company and Mr. Wright, its manager, in the Antwerp court in 1886?

A. No, I did not see a copy of the judgment.

X Q. 267. That suit being brought, as I understand it, by your agents to stop the London Oil & Color Co. and Mr. Wright, its manager, from advertising and selling a composition under the title of the "Original Rahtjen's composition," manufactured by the London Oil & Color Co., accompanied by a statement that the composition was strictly in conformity with the recipe deposited by Rahtjen's in the Patent Office, did you not feel interested enough in the matter to ascertain what the decision in the case was?

Same objection and notice, and the further objection that this is not proper cross-examination, and whatever testimony may be adduced shall be treated as the evidence of the defendant, and subject to cross-examination by complainant's counsel.

A. My agents, Suter Hartmann & Co., of London, had the agency for Belgium, and I had no right to interfere if they thought fit not to bring the action to a close against Wright & Co. Had I to decide I certainly should have followed the matter up the same as I did with Holzapfel & Co. at Hamburg.

X Q. 268. How do you know that Suter Hartmann & Co., or the plaintiffs in the suit, did not follow it up in the Antwerp case against the London Oil & Color Co.?

Same objection and notice.

197 A. As I said before I believe I remember having seen Wright & Co. issuing a circular similar to that, but not that one which you have shown me, and where they state they are going on using the name; that is all I could say about it.

X Q. 269. Did you not feel curiosity enough to enquire of Suter Hartmann & Co., or the Belgian agents what the decision in the suit was?

Same objection and notice.

A. No, I did not.

X Q. 270. The suit which you caused to be brought in Hamburg in 1896 against Max Holzapfel, his retired agent Johann Hermann Friedrich Schultz of Hamburg, and his then agent Claus Rudolph Johannes Joost of Hamburg, was for advertising and selling a composition under the designation of "Genuine Rahtjen's patent composition," was it not?

Complainant's counsel gives notice that all questions by defendant's counsel, and all answers elicited in reference to this subject-matter are subject to the objections originally made thereto, and to the notices given of a motion to strike the same from the record. The question is further objected to because there is no evidence in the case of any suit, the names mentioned by counsel having not before appeared in the evidence in this suit, and consequently for that reason the question is grossly incompetent, irrelevant, and immaterial. The question is further objected to as not proper cross-examination and complainant's counsel gives further notice that he will claim the right to treat the same as defendant's affirmative proofs, and to cross-examine upon the same, subject to the objections above noted, which are not waived.

198 A. I think it was under "Genuine Rahtjen's composition" omitting the word "patent."

X Q. 271. Why do you think that the word "patent" was not used?

Same objections and notices.

A. I saw the drums and did not note the word "patent."

X Q. 272. Do you remember whether the letter-heads, advertising circulars, or pamphlets, and such printed matter of the defendants were also involved in the suit?

Same objections and notices.

A. Yes; I had them confiscated by the public prosecutor.

X Q. 273. Do you remember whether as a matter of fact those circulars and letter-heads and pamphlets, or any of them, contained the words "Rahtjen's patent composition"?

Same objections and notices.

A. I believe they contained only the words "Genuine Rahtjen's composition."

X Q. 274. That suit was brought in the criminal court of the landgericht of Hamburg?

Same objections and notices.

A. Yes.

X Q. 275. As a matter of fact do you not know that all three of the accused were acquitted?

Same objections and notices.

A. Yes; they were. It was considered that Mr. Holzapfel having lived so long out of Germany did not know the law of the trade-mark in Germany. Only for these reasons they were acquitted.

Defendant's counsel objects to all of the answer following the words "Yes they were" on the ground that the same is sec-
199 ondary evidence and not responsive to the question.

Complainant's counsel notes that all this investigation is wholly incompetent, irrelevant and immaterial and secondary in character by action of defendant's counsel, and further that the witness when asked a question of this character has the right to explain his answer in the way that he has done.

X Q. 276. Was not, as a matter of fact, the cost of the trial charged to the treasury of the State?

Same objections and notices.

A. As I paid no expenses besides my solicitor, I dare say that is right.

X Q. 277. And your solicitor was the public prosecutor?

Same objections and notices.

A. No.

X Q. 278. You had then in addition to the services of the public prosecutor a solicitor that you individually retained?

Same objections and notices.

A. Yes.

X Q. 279. You caused no appeal to be taken from the decision of the criminal court of the landgericht, did you, and the case was carried no further, was it?

Same objections and notices.

A. I asked for an appeal. I got the reply that I had no right to ask for an appeal. If an appeal was to be taken it would be taken by the public prosecutor himself.

X Q. 280. And you instituted no other proceedings against Max Holzapfel or his agents in Hamburg?

Same objections and notices.

200 A. No, I did not because I believed that that firm would give up sailing under my flag; all the more as I have a letter from their solicitor offering me money if I would withdraw the case from the court.

X Q. 281. But you refused to withdraw it from the criminal court?

Same objections and notices.

A. I refused. I refused to take the money, but I put the condition that the firm Holzapfel should not use my name any more. This they refused.

X Q. 282. Then the case was pushed before the criminal court of the landgericht?

Same objections and notices.

A. Yes.

X Q. 283. Referring to Defendant's Exhibit "Rahtjen's Circular," you or your firm called the composition "Rahtjen's patent composition," do you not?

All questions by defendant's counsel in reference to this exhibit are objected to by counsel for complainant as incompetent, irrelevant and immaterial, and as not proper cross-examination, and notice is further given that at the hearing of the case motion will be made to strike the same from the record, and that all testimony elicited shall be treated as affirmative evidence and subject to cross-examination by complainant's counsel.

A. It is called "Rahtjen's composition" and "Rahtjen's patent composition" in this circular. This circular was published when the patent was still in existence.

(By Mr. MERWIN:)

Q. What patent?

A. The English patent. I may add that the word is used
201 in Germany quite similar to that as in America; patent medicines—things which are of a certain secret not publicly known are called "patent" whether there is a patent on them or not.

X Q. 284. Is that what you mean when you put the royal coat of arms and the words "By royal letters patent" at the head of this circular?

Same objections and notices.

A. No, I just mentioned that this was published when the English patent was in existence.

X Q. 285. And in calling it "patent composition" you mean it was covered by an English patent?

Same objections and notices.

A. Yes.

X Q. 286. Referring to Defendant's Exhibit "Rahtjen's Circular," do you know about what year this circular was issued?

Same objections and notices.

A. It must have been shortly after 1880—1881 or so. I do not know it; there is no date on it.

X Q. 287. Look at Defendant's Exhibit Certified Copy of the Rahtjen Patent No. 3920 of 1873 and state whether or not that is the letters patent to which you had reference in the circular Defendant's Exhibit Rahtjen's Circular?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, that is quite right. The date seems to be correct.

X Q. 288. Were you or your firm the owners of the Heinrich Rahtjen English patent of 1873 at the time that you issued this circular, the Defendant's Exhibit Rahtjen's Circular?

Same objection and the further notice that this evidence also is defendant's affirmative case and should be subject to cross-
202 examination by complainant's counsel, without waiving objections heretofore made, or notice to strike out.

A. My brother and myself were the owners of the German business.

X Q. 289. The business carried on under that Rahtjen patent of 1873?

A. Yes.

Complainant's counsel protests against misleading the witness by inducing him to answer questions without fully understanding the meaning or purpose of the same, it being well known that there was no patent in Germany, and that the British patent had no legal effect whatsoever there.

X Q. 290. How long did you, or your brother, or your firm, continue to be the owner or owners of the Heinrich Rahtjen' spatent of 1873?

Same objections and notice.

A. We were the owners of the business until we transferred it.

X Q. 291. And while you carried on the business did you continue to remain the owners of the Heinrich Rahtjen's patent of 1873?

Same objections and notice.

Complainant's counsel advises the witness that if the answers called for by any of these questions would disclose any confidential or private relations between his firm and other parties which it would be detrimental to have known to a competitor, he may decline to answer such questions or so much of them as may have that character, giving such reason therefor.

A. We did not part with it.

X Q. 292. When you gave up the business did you part with the patent then and, if so, to whom?

Same objections and notice.

203 A. It was transferred to Messrs. Hartmann Brothers.

X Q. 293. It was in 1880 as I understand from your previous testimony that you gave up the business of manufacturing this composition?

A. Yes, in England.

X Q. 294. And it was at that time that you assigned the patent to Hartmann Brothers?

A. Yes.

X Q. 295. In this assignment of the English patent of 1873 to Hartmann Bros., did you or your firm reserve a royalty to yourselves for the use of said patent or in consideration of the assignment thereof?

Objected to as incompetent, irrelevant and immaterial, and the witness is advised that he is not obliged to disclose any business transaction or secrets or confidential relations not pertaining to this suit which *it* would be detrimental to either his own interests or the interests of the complainant in this suit to have disclosed to a competitor, and he is at liberty if such be the fact to decline to answer the question for this reason.

Complainant's counsel on behalf of complainant advises the witness that the evidence called for is of such a character as to be detrimental to the interests of the complainant.

Defendant's counsel protests against the instructions to the witness.

A. The answer would be a complicated one. I therefore decline to answer it.

Counsel for complainant suggests to witness that he must seek some other reason than that the answer is complicated to justify not answering.

Counsel for complainant requests the instructions to the witness to be again read to him.

A. I decline to answer on the advice of counsel.

204 Defendant's counsel protests against the refusal of the witness to answer.

X Q. 296. Did you or your firm when you made the assignment to Hartmann Brothers receive a counterpart of the agreement?

A. Yes.

X Q. 297. Have you that paper in your possession?

A. I have.

X Q. 298. Will you produce it?

Complainant's counsel objects to the attempt by indirection to secure the private confidential papers of the witness and of the English corporation, which is also a stockholder in the complainant company, and inasmuch as the contract in question is not necessary as evidence in this case or pertinent to its issues, counsel directs the witness to refuse to produce the paper.

Defendant's counsel protests against the instruction to the witness.

A. Under the advice of counsel I refuse to produce it.

X Q. 299. Was there any written agreement between you and Hartmann Brothers in reference to the manufacture or sale of your composition, or in reference to the use of the name "Rahtjen" in connection with any composition, except so far as may be embodied in the assignment of the Rahtjen patent to them in 1880?

Complainant's counsel objects to the form of the question, because

it is referring to something which is not in evidence and obviously intended to confuse and puzzle the witness, and therefore insists that defendant's counsel shall make his questions proper in form as well as in substance.

Defendant's counsel thinks the question is plain and that it can be understood by the witness.

205 A. I think every particular was within the agreement with Hartmann Brothers and in the assignment of the patents.

X Q. 300. And the agreement and assignment of the patent was contained in one instrument of which you had a copy and they had a copy. Was that so?

A. The assignment of the patent and the agreement are separate instruments.

X Q. 301. And in which of them was the royalty reserved to your firm?

A. Certainly not in the assignment of the patent.

X Q. 302. Have you the instrument in which the royalty was reserved to your firm?

A. I have.

X Q. 303. Will you produce it?

A. No.

Complainant's counsel notes that this is the instrument which has been previously called for and the production refused by the advice of counsel.

Complainant's counsel further gives notice that the substance of said agreement in so far as it is pertinent and competent evidence in this case will be given if desired to defendant's counsel, or put in evidence, but that the instrument as a whole and any complete single part thereof is of such a character that its disclosure will be detrimental to the interests of the case, and contains matter which is not relevant to the issues involved, and for this reason, and this reason only, the advice and instruction as above have been given to the witness. Defendant's counsel's understanding is that whatever title the American company, the complainants in this suit, derived, they derived by mesne assignments from Hartmann Brothers, and it is therefore material and important in the case that the rights and the whole of the rights that Hartmann Bros. acquired by any instrument in writing should be clearly established and for that
206 purpose he has called for the production of such instrument that the court may see just what rights were conveyed by that instrument.

Adjourned till half past two p. m. to the same place.

Counsel for complainant states that during the recess just taken he has carefully examined the document called for and conferred with the parties interested, and withdraws all objection to the subject-matter of the same being introduced in evidence, and will have an accurate copy of the same prepared, omitting merely matters of consideration price, and so forth which have no bearing upon the case, and submitted to defendant's counsel for comparison with the origi-

nal and for his approval thereof; and when so approved, the same to be introduced in evidence in lieu of the original and with the same force and effect.

X Q. 304. Now, calling your attention to the letter of your firm to Henry Gelien of November 19th, 1869, which you have offered in evidence and translated, let me ask you if your translation, while not a verbatim translation, was full and complete?

A. No, I told you that I had not translated it word by word, but I only gave the meaning of it.

X Q. 305. But you have given the meaning of all of the letter in evidence?

A. A sentence might have been left out without my noticing it; I did not do it on purpose.

X Q. 306. Please translate so much of the letter as is contained in lines 5, 6, 7, 8, 9, 10, 11 and 12?

A. "Having asked information, it is difficult in the United States to get a patent on my paint from the reason because my paint contains some parts which are already known in other paints, and the Patent Office will no doubt refuse the patent."

207 Well that is the meaning of it. I did not know that that would be wanted at all here. I simply made this out for Mr. Merwin on the previous occasion.

X Q. 307. As you previously translated that portion of the letter in your answer to question 28, your translation was as follows, was it not?

"In reply to which I have to state that I have not obtained a patent for my composition in America, nor have I applied for one in the United States."

A. I have been unable to read these various words but now I come to it I see it better. I have gone oftener over it and I see it better. Here "the information has been taken," and I read it that:

"The United States would not grant a patent on my paint on the ground that this my paint contains some parts which were already known and that the Patent Office would refuse a patent."

I have not been able to read these various words not having written the letter and so the mistake occurred.

X Q. 308. But you made a written translation of this letter before you testified in this case, did you not?

A. Yes.

X Q. 309. And it was from that written translation that you gave your answer to question 28 of your direct testimony?

A. Yes, it was.

X Q. 310. As you have given the translations of lines 5 to 12 inclusive of the letter in your answer to question X Q. 306, that translation that you then gave is correct, is it not—the one that you have just given?

A. Yes, so far as I am able to translate it. There are some

208 words—you cannot read them all—they are gone—they do not appear in the press copy.

X Q. 311. But so far as you can correctly read and translate the

press copy, so far as the lines 5 to 12 inclusive are concerned, you have done so in answer to my cross-question 306?

A. Yes.

X Q. 312. In your translation of the letter which you gave in answer to question 28 you translated a clause as follows: "Spurious imitations have already been tried and abandoned," where do you find the German for that sentence in the letter-press copy of November 19th, 1869?

A. At lines 21 to 26.

"Several opponents here and at other places have tried to introduce into the market a similar paint to mine, but it has been abandoned by all consumers on account of its inferiority."

I must again say that I have not known that it would be taken word by word, and that this translation is nothing else but for information for my counsel.

Defendant's counsel objects to the translation of the German letter given in answer to question 28 of the witness' direct examination, on the ground that the same is not a complete and accurate translation thereof.

Complainant's counsel gives notice that he will have prepared and attached to the exhibit a careful and true translation of the same, by which the answer to question 28 may be corrected.

X Q. 313. You stated in your previous testimony that the stencils used by you on this composition in Liverpool and London were subsequently transferred by you to Hartmann Bros., when you gave up the manufacture in England. I have correctly understood you in that respect, have I not?

209 A. I gave up the manufacture in London.

X Q. 314. And you had previously given up the manufacture in Liverpool?

A. Yes; before coming to London.

X Q. 315. These stencils were then turned over to Hartmann Bros. some time in 1880?

A. In 1880.

X Q. 316. Were they transferred to Hartmann Bros. for the purpose of their continuing the use of such stencils and for the purpose of continuity in the markings?

A. Yes; they were, but I do not know whether they used them as they got them because they made some additions to it.

X Q. 317. Did the stencils which you turned over to Hartmann Bros. contain the word "Rahtjen," or the words "Rahtjen's compositions"?

A. "Rahtjen's composition."

X Q. 318. Are you positive about that—that these stencils did contain the words "Rahtjen's composition"?

A. Yes.

X Q. 319. You have not the stencils before you and have not seen them for a long length of time and are merely speaking from memory, is that not so?

A. We have not been making anything else but Rahtjen's com-

position, and to the best of my belief on every cask "Rahtjen's composition" was stenciled, and no other stencils were made.

X Q. 320. But you have not seen those stencils for very many years, have you?

A. I have not seen them again since I left London.

X Q. 321. And so when you are telling what was on those stencils you are relying on your memory as to what was on them?

A. Yes.

210 X Q. 322. And you have nothing that would help you to describe what was on those stencils except your memory?

A. Nothing else.

X Q. 323. Do you remember any change, or addition, or omission which Hartmann Bros. made in the stencils, or in the manner of stenciling the barrels or kegs of the composition after the business in England was transferred to them?

A. No; I do not remember.

X Q. 324. If such change had taken place you would be likely to remember it, would you not?

A. Yes.

X Q. 325. Look at the photograph now shown you marked "Defendant's Exhibit Photograph of Barrel Heads," and state whether that is not the way in which the barrel heads were stencilled by you and by Hartmann Bros. in England?

A. It looks like it. I could not for certain say that it was stenciled by my people.

X Q. 326. Do you remember whether or not the stencils used by you while manufacturing in England were like the stencils or markings on the barrel heads shown in this photograph?

A. The marks on the lower barrel in the photograph on one side of the barrel, "S. H. & Co." and the destination and number are familiar to me but the other marks are not. "Rahtjen's composition" has been put on the other heads of the barrels so far as I remember, or at least on those which we exported. It may be that now and then those that were left in England were without that mark. I could not possibly remember; it is too long ago. I may add that I have not seen every barrel marked in Liverpool. I have often been away and perhaps my man did send it without a mark against my instructions.

X Q. 327. You did not superintend the marking yourself?

A. No.

211 X Q. 328. Look at Defendant's Exhibit Advice Notes of 1878 and 1879 of Johann Rahtjen, and state if said exhibit refreshes your recollection as to the markings on the casks or barrels of the composition shipped by you?

A. I did not write those. And I do not remember anything of them.

X Q. 329. Do you know in whose handwriting they are?

A. Yes, of one of my former clerks.

X Q. 330. Is it not possible that the stencils or markings on the barrels and casks as put on by you and afterwards by Hartmann Bros. did not contain the words "Rahtjen's composition"?

A. I had extra stencils made for that purpose—"Rahtjen's composition;" other stencils with 1, 2 and 3; other stencils with destination, and besides that the numbers of the casks and "S. H. & Co." and what else was wanted.

X Q. 331. But you cannot tell me who cut these stencils for you?

A. We had them made from card-board and we cut those ourselves; and we had them made from metal—I had some cut by people who did that sort of work.

X Q. 332. But you cannot give me the names of these people who cut those stencils?

A. It is impossible for me.

X Q. 333. Can you give me the names of the person or persons who cut the paper stencils which you say contained the words "Rahtjen's composition," and which you used in England?

A. I cannot. I frequently cut them myself in card-board but not always. But as they are very liable to break they were burnt when broken or thrown away.

X Q. 334. But the metal ones which were more permanent in character were the ones that were transferred to Hartmann Bros. when the business was turned over to them?

212 A. What I had left I gave to Hartmann Bros. here in London. Whether they used them I cannot tell.

X Q. 335. As you transferred these stencils to Hartmann Bros. in 1880, or 19 years ago, and used them prior to that time, it is requiring you to carry back your memory over a long time, and is it not possible that you may be mistaken as to the words "Rahtjen's composition" appearing on the markings of the barrels or casks themselves?

A. I made no other stuff than "Rahtjen's composition," and there was no necessity for me to mark them differently.

X Q. 336. You have said in your cross-examination that your memory for facts and events is not very reliable. In view of that statement and in view of the long period of time over which you are required to carry back your memory, is it not possible that you may be mistaken regarding the words, "Rahtjen's composition" appearing in the markings themselves on the casks or barrels?

A. I have always taken care that "Rahtjen's composition" should appear on every cask, but as no man is infallible some of the casks may not have been marked. Of course for a certainty I could not say that every keg or cask did bear the words "Rahtjen's composition." Instructions were given that it should be stencilled on.

X Q. 337. Do you remember the markings on the kegs or barrels being like the markings on either of the barrel heads shown in the upper half of the photograph, Defendant's Exhibit Photograph of Barrel Heads?

A. The one with the "S. H. & Co." the numbers and the destination is familiar to me, as I have said, but not the other head.

X Q. 338. You have now identified the two right-hand representations of barrel heads on the photograph. Please state how far the two representations of barrel heads on the left hand of the

213 photograph correspond with your recollections of the stencil markings on the barrels?

A. The "III" on the upper left-hand one and the words "Stir well before using," I remember as appearing on those; and then on the lower left-hand one I remember "priming" and "Stir well before using," also appearing. What I do not see is "Rahtjen's composition."

X Q. 339. Did you execute any transfer of a trade-mark to Hartmann Bros.?

A. The only instruments executed by our firm with Hartmann Bros. connected with the transfer of the business to that firm were the business agreement for which you have called, and an assignment of letters patent.

X Q. 340. You had no registered trade-mark at that time, had you?

A. No.

X Q. 341. You have since registered a trade-mark in Germany, have you not, for an open red hand used in connection with the Rahtjen's composition?

Objected to as incompetent, irrelevant and immaterial.

A. I have registered a trade-mark, an open red hand, or at least an open hand.

X Q. 342. Of a red color?

A. Well, we do color it red. It is not exactly said that it is red in Germany—an open hand. And besides that the name "Rahtjen," and besides that a circle with "Rahtjen composition," a small hand in it, below that, "anti-corrosive and anti-fouling," were registered.

X Q. 343. When did you get the first of these registrations and which one was it?

Same objection and further as calling for secondary evidence.

A. The first registration was handed in at Bremerhaven. I cannot state the date—the year.

214 X Q. 344. Was it about the same time that the parties in England to whom you had transferred the business in that country also registered the open hand as a trade-mark?

Same objection.

A. Yes, it was at the same time.

X Q. 345. But you do not remember the year?

Same objection.

A. I do not remember the year.

Redirect examination by Mr. MERWIN:

Q. 346. The circular introduced in evidence by the defendants which was produced by you and which has been marked "Defendant's Exhibit Rahtjen's Circular," is in what language?

A. German.

Q. 347. It was used or circulated where?

A. In Germany.

Q. 348. It was for use in Germany only then, was it—for German customers?

A. In Germany only.

Q. 349. Are you familiar with and do you know, the signature of Henry Gelien, who was your agent in the United States some years since?

A. Yes.

Q. 350. You were asked in cross-question 209, "Have you any letters or other documents or papers from Gelien in which the word 'Rahtjen,' or the words 'Rahtjen's composition,' appear or appears." I show you two letters written upon the same letter-head of Henry Gelien as has been placed in evidence, both addressed to Suter Hartmann & Co., one dated July 14th, 1874, and the other February 27th, 1875. Please examine those and see if you know the signature attached to them?

A. Both signatures are of Henry Gelien.

215 Complainant's counsel offers the said letters in evidence, and the same are received and marked "Complainant's Exhibit U, No. 1 and 2," respectively.

Defendant's counsel objected to the reception in evidence of said letters on the ground that it does not appear that the said letters were written to the witness, or were received by him; and if not received by him, there is no evidence as to when they were written or when they were received or by whom, and therefore the said offer in evidence is incompetent.

Q. 351. In your cross-examination you have testified that while engaged in the manufacture of Rahtjen's composition in England you marked or cause to be marked the packages containing the same by stencil or label with the words, "Rahtjen's composition." Look at the document which I show you and tell me what it is.

A. It is a label saying "Rahtjen's patent composition No. 2." It is a label which was pasted and tacked to the casks.

Q. 352. To what casks do you refer?

A. To casks which contained Rahtjen's composition No. 2.

Q. 353. Made when and where?

A. Made in England.

Q. 354. By whom?

A. By my firm.

Q. 355. State whether or not this is one of the labels to which you referred in your previous testimony.

A. It is.

Q. 356. It was your rule and practice then while manufacturing Rahtjen's compositions in England as you have testified to have all of the packages marked either by stencil or by label with the

216 words "Rahtjen's composition" and other marks, and this I understand you is one of such labels?

Objected to as leading.

A. Yes, it is, but they were not used from the beginning when I

made the paint in England. I do not remember the time when I commenced putting them on.

Complainant's counsel offers the label in evidence and the same is received and marked "Complainant's Exhibit V."

Q. 357. State as nearly as you can recollect about when you commenced using paper labels of this character.

A. It may be that I have used them in the latter part of my time when manufacturing in Liverpool, but I am not certain about that; but I know that I used them when making the paint in London.

Q. 358. Were the labels which you had placed upon the barrels containing compositions No. 1 and No. 3 like this exhibit in color?

A. If I do not make a mistake the color for No. 1 was white and No. 3 might be like this exhibit—I do not remember.

Q. 359. Was the printed matter upon the other labels substantially the same as this?

A. Exactly the same except the numbers were different.

Q. 360. When did you first commence using metal drums in manufacturing Rahtjen's composition in England?

Objected to as not proper redirect examination.

A. Drums were used together with casks in the latter part of the time when I manufactured the paint in London.

Q. 361. How was the mark of Rahtjen's composition placed upon the metal drums?

217 Same objection.

A. By stencilling.

Q. 362. Do you know whether Hartmann Brothers marked the drums or barrels of Rahtjen's compositions with the words "Rahtjen's composition" after they succeeded to your business?

Objected to as leading.

A. After I left England Hartmann Brothers had some difficulty now and then in making the composition, and I had to come to London to assist them. When at the works I had some drums taken before me and had opened them to examine the contents. I then saw that the drums were marked "Rahtjen's composition" so far as I remember.

Q. 363. How frequently did you visit their place of business after they had succeeded you?

A. I was in London the second year I think three times. The third year I do not remember. They managed to get on by themselves.

Q. 364. You then visited their place of business several times after you had transferred the business to them?

A. I did.

Q. 365. And you therefore had opportunity at such visits to see the drums which they were using and the marks upon them?

Objected to as leading.

A. Yes; so far as I remember they were all marked "Rahtjen's composition."

Q. 366. What were these marks—labels or stencils?

A. Stencils.

Adjourned to tomorrow, 30th August, at 11 o'clock a. m., to the same place.

218 30TH AUGUST, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Redirect examination of Mr. JOHN RAHTJEN resumed:

Counsel for complainant, referring to cross-question 295 and his objection entered thereto, now states that after examining the document in question he withdraws such objection and herewith tenders a copy of such assignment for the inspection of counsel for the defendant.

Complainant's counsel further states that he will furnish to defendant's counsel a correct copy of said assignment with the understanding that if the same is introduced in evidence it shall be with the same force and effect as if the original were so introduced.

Q. 367. Before coming to England to give your testimony in this case did you, at my request, and under my instructions, make a general careful search among the books, papers and effects of your firm and of your father for any and all matters of evidence in respect to your and his business in the sale of Rahtjen's compositions in the United States from 1870 to 1879?

Objected to as leading.

A. I did.

Q. 368. If there had been among those papers, books and effects any old stencils of that early date, would you in your judgment have found them?

Objected to as leading.

A. Yes, I should have found them.

Q. 369. Would you have found in such search, if any there were, other letters from Henry Gelien and Hartmann, Le Doux & Maecker, to you, or copies of letters from you to them, than those you have produced?

Objected to as leading.

219 A. I must have found them.

Q. 370. During those years was it your custom to take letter-press copies of invoices to your agents in the United States?

A. So far as I remember letters only were press-copied.

Q. 371. Please give the amount of sales by your father and your firm of "Rahtjen's compositions" to Henry Gelien and Hartmann, Le Doux & Maecker in the United States in the years 1870 to 1879

inclusive, stating the value in German and English currency if you have it?

Objected to as not proper redirect examination.

A. I have it made out in marks in German money and in dollars of the United States—is that sufficient—as near as possible reckoning four marks to a dollar that is about the value.

Q. 372. The valuation in marks is as you have taken it from your books and verified the figures?

Same objection and as leading.

A. Yes, exactly so.

Q. 373. Please give the amounts expressed in the two currencies?

Same objection and this objection is continued to this line of redirect examination with the same force as if repeated after each question.

A. In 1870, 330 marks, 82½ dollars; in 1871, 8,868 marks, 2,217 dollars; in 1872, 8,298 marks, 2,074½ dollars; in 1873, 22,202 marks or 5,550½ dollars; in 1874, 13,518 marks or 3,379½ dollars; in 1875, 9,498 marks or 2,374½ dollars; in 1876, 4,665 marks or 1,166¼ dollars; in 1877, 4,749 marks or 1,187¼ dollars. These are the sales to Gelien. Those to Hartmann, Le Doux & Maecker are in 1879 (in English money) £707.8.0 or 3,537 dollars; in 1878 £553.15.2 or
220 2,768 dollars and 75 cents. Of course these amounts are not exactly the rate of exchange for marks and pounds and dollars; they are about 4s. to a dollar.

Q. 374. That is calling how many dollars to the English pound sterling?

A. Five dollars to the sovereign.

Q. 375. Were these prices as you have given them charged to your agents?

A. Yes.

Q. 376. Were these selling prices the selling prices of the composition by your agent to the public?

A. No, these were our prices. We left it to them to make their own prices.

Q. 377. Do these prices include the cost of transportation, insurance and the like, or only the net prices for the composition itself?

A. We put the paint on board of the ship and all the charges were for the buyer.

Q. 378. That is your agents?

A. Yes, the agents.

Q. 379. Are the amounts which you have just given of your sales in the United States during the years mentioned the amounts from which you estimated the quantities of the composition heretofore given by you?

A. Yes, may I add that the amounts were the exact amounts of the invoices sent to Gelien and Hartmann, Le Doux & Maecker?

Q. 380. I read to you question and answer 82 of your direct examination:

"Q. 82. Did you ever manufacture Rahtjen's composition in Eng-
"land and, if so, commencing about what date and continuing for
"how long? A. I made the composition in Liverpool and I erected
"a factory there in the year 1875, I think."

I read to you also from your cross-examination: "X Q. 169. Are
"you positive that it was 1873 that you came over to Liver-
221 "pool and embarked in the manufacture of this composition
"there? A. It may be 1874, I do not remember for certain.
"X Q. 170. Could it have been 1875? A. No. * * * X Q.
"186. Do you still think you began the manufacture in that
"factory in 1874? A. In 1875. X Q. 187. You think in 1875?
"A. Yes. With my counsel's permission I could give you the exact
"date from my books as soon as I get back to Hamburg if stress is
"laid upon it." State whether or not since giving these answers you have had opportunity to examine books and papers in the possession of Suter Hartmann and Rahtjen's Composition Co., Ltd., relating to the business of manufacturing Rahtjen's composition in England; and if so, whether you can now be positive as to the date of your commencing such manufacture, and the date when the factory was built?

A. I have taken the opportunity of looking to the books of Suter Hartmann & Co., and, besides that, I remember a most serious incident in the year of 1873 which made me certain about the time which I in my former statement could not give with exactness. I left Bremerhaven for Liverpool at the end of 1873. In that time the factory was nearly complete. Then at the beginning of 1874 I supplied the first Rahtjen's composition to Suter Hartmann & Co. in London.

Q. 381. About when did you first commence manufacturing in the new factory?

A. In the beginning of 1874.

Q. 382. You speak of the first composition which you furnished to Suter Hartmann & Co. in London. Do you mean that it was from the new factory you have just described in Liverpool?

A. Yes.

Q. 383. Did you in your manufacture of Rahtjen's composition use the paper labels about which you have testified and a sample of which is in evidence upon the iron drums containing the composition?

222 A. Yes, I used them for some time.

Q. 384. Did you at any time or for any reason discontinue the use of the labels upon the iron drums?

A. Yes, they would not stick to the iron drums. They curled up and they fell off.

Q. 385. How did you secure these labels upon the wooden casks or barrels?

A. They were pasted on the casks and the corners were tacked to prevent their falling off.

Q. 386. I read to you from your redirect examination: "Q. 365.
"And you therefore had opportunity at such visits to see the drums
"which they were using and the marks upon them? A. Yes, so far

"as I remember they were all marked 'Rahtjen's composition.'" This question and answer is in connection with the markings which you state you saw upon the drums of Rahtjen's composition manufactured by your successors, Hartmann Bros. Are you certain that you ever saw the mark "Rahtjen's composition" upon their packages?

A. Yes, I am certain.

Q. 387. Upon which of theirs in particular, if any?

A. On casks and drums which I had opened to examine the contents.

Q. 388. Would the fact of your having opened them to examine the contents call the markings more particularly to your attention than those that you did not inspect?

A. Certainly. I was looking at the marking to see what the casks and drums contained.

Q. 389. I read to you from your cross-examination in respect to the paper label about which you testify and sample of which was placed in evidence. "X Q. 162. What was the phraseology as near "as you can remember? A. 'None genuine without the signature.' "I remember them. 'Suter Hartmann & Co.' was underneath it.

"X Q. 163. Did the words 'Rahtjen's composition' appear on
223 "the label? A. Well, I could not say but I am almost cer-
"tain it did, otherwise that label would not have any value."
Your memory having been refreshed by seeing samples of these labels, state whether or not you are now positive as to whether the words "Rahtjen's composition" always appeared on the labels so used?

A. The words "Rahtjen's composition" always appeared on these labels besides the word "patent."

Q. 390. I read from your cross-examination: "X Q. 326. Do you "remember whether or not the stencils used by you while manu-"facturing in England were like the stencils or markings on the "barrel head contained in this photograph? (A.) The marks on the "lower barrel in the photograph on one side of the barrel, 'S. H. & "Co.' and the destination and number are familiar to me, but the "other marks are not. 'Rahtjen's composition' has been put on "the other heads of the barrel so far as I remember, or at least on "those which we exported. It may be that now and then those that "were left in England were without that mark." Please explain what you mean by the last sentences of your answer that at least the barrels which were exported were so marked, but that now and then those left in England may not have been?

A. In preparing the lots for export we had plenty of time to stencil the packages with "Rahtjen's composition" on them; whilst often the order for the United Kingdom came in in a great hurry and had to be executed on the same day, and it may be that these lots were now and then shipped without the stencil "Rahtjen's composition" on them.

Q. 391. State whether or not it was regarded as a matter of equal importance that the goods shipped to your own agents at home to

be used by them should be marked with the trade name as it was with those which were to be exported?

224 Objected to as leading.

A. It was not of equal importance in my opinion, as the agents all knew that they got nothing else but "Rahtjen's composition" in these casks.

Q. 392. I read from your cross-examination: "X Q. 249. Have "you got a certificate of stock issued by the American company to "you? A. It may be; I do not remember it." State whether or not you have refreshed your memory on this point and can now answer more certainly.

A. Yes, I received a certificate.

Q. 392*a*. Certificate for what?

A. For shares or for stock which I held in the American company.

Q. 393. Is that certificate still in your possession?

A. Yes, it is.

Q. 394. How was this stock secured or acquired by you? Did you pay for it or was it acquired in some other way?

A. I paid for it.

Q. 395. I read from your cross-examination with reference to your suit against Holzapfel in Germany: "X Q. 272. Do you remember "whether the letter-heads, advertising circulars or pamphlets and "such printed matter of the defendants were also involved in the "suit? A. Yes, I had them confiscated by the public prosecutor." State whether there was any other property of the defendants which was also confiscated in connection with that case.

Objected to as calling for secondary evidence.

A. Yes, there were six drums mark- "Genuine Rahtjen's composition," which remained as I heard from a larger lot being introduced into Hamburg that were confiscated.

Q. 396. Since that trial has your business in Germany been interfered with by Holzapfels by their selling or attempting to sell to your knowledge any composition marked "Rahtjen's composition"?

225 A. Not that I know of.

Recross-examination by Mr. McMASTER:

Subject to objections heretofore taken.

X Q. 397. You say the drums were confiscated in this Hamburg suit or procedure as I understand it. What was done with those drums at the end of the suit or proceedings?

A. I do not know. I only saw them locked up during the suit.

X Q. 398. You do not know then whether they were handed back to the defendants in that case or not?

A. I do not know.

X Q. 399. You never heard?

A. No, I never heard it.

X Q. 400. You say that your business has not been interfered with in Germany by the sale of the composition made by Holzapfel & Co. or the Holzapfel Composition Co., Ltd., under the name of "Rahtjen's composition" or "Rahtjen's patent composition." Do you know of Holzapfel & Co., or the present defendants, The Holzapfel Compositions Co., making and selling a composition under a name of which "Rahtjen" forms part?

A. I do not know that. I did not hear of it. I should immediately bring an action against them if that was true.

X Q. 401. Do you not know that they manufacture composition in England which they sell under a name of which the word "Rahtjen" forms part?

A. I know that—that they make and sell it in England I know.

X Q. 402. How long have you known that?

Objected to as incompetent, irrelevant and immaterial.

A. I have known it since years, but I do not know when I first heard it.

X Q. 403. Did you know it when you or your firm applied for registered trade-marks in England?

226 Same objection and the further one that this is wholly improper recross-examination that such recross-examination must be confined in reference to this particular subject to the business in Germany.

A. Yes.

X Q. 404. And you have known of it of course ever since?

Same objections.

A. Yes.

X Q. 405. Do you know of the defendant company or their predecessors, Holzapfel & Co., selling a composition under a name of which the word "Rahtjen" forms part in Denmark or Sweden or Norway?

Same objections.

A. I heard that a Rahtjen composition was sold in one or two of these countries.

This answer is further objected to as being merely hearsay, and therefore incompetent, irrelevant and immaterial.

X Q. 406. How long ago did you hear of it?

Same objection as heretofore and further that the question calls for merely hearsay evidence.

A. I should say about two years ago, and to stop this I have taken proceedings against Holzapfel & Co. which are still in preparation.

X Q. 407. But no suit has been brought against them?

Subject to same objections.

A. Not yet.

X Q. 408. Have you given them any notice that you proposed to sue them?

Same objections.

227 A. No, not yet.

X Q. 409. In which of the countries which I have named was it that you learnt that the defendant company was selling a composition under a name of which the word "Rahtjen" formed part?

In addition to the same objections as previously made to this question the witness is advised that if this tends to disclose to an opponent any matters which it is for his business interest to keep undisclosed, he may decline to answer the question for that reason.

A. In two of these three countries, but I do not know which; whether Denmark and Norway or Sweden and Norway or Sweden and Denmark.

X Q. 410. You say that with regard to the drums or casks which were intended to be sent to the English agents it was not of as much importance that they should be marked with the name "Rahtjen's composition" or "Rahtjen's patent composition" because the agents knew that they were getting Rahtjen's composition; but that it was of more importance that the drums sent to the agents abroad should be marked with the words "Rahtjen's composition" or "Rahtjen's patent composition." Would not the agents abroad know equally well as the English agents that in ordering the composition from you and receiving it from you they were getting only Rahtjen's composition?

A. Yes, but I considered it an advertisement on those packages to have "Rahtjen's composition" marked on them.

X Q. 411. Would it not be an advertisement also to have it on the packages sent to the English agents equally?

A. I do not think so. Those packages were taken into the dry docks and used.

228 X Q. 412. And in the dry docks they were exposed to the view of anybody whose business called them there?

A. Yes; often the lids of the casks were taken out and it could not be seen what the casks contained.

X Q. 413. Would not that be the same in the case of using these casks in dry docks abroad?

A. Yes, but the packages passing through so many hands every one could see that they contained "Rahtjen's composition."

X Q. 414. Do you know where labels like Defendant's Exhibit V were printed and by whom?

A. They were printed, I believe, in London. Suter Hartmann & Co. had them printed for themselves.

X Q. 415. But you do not know the name of the printer?

A. It is not on it and I do not know it.

X Q. 416. Were these labels used on casks or drums which had previously been stencilled?

A. The cask- were stencilled "Rahtjen's composition," and under-

neath the stencilling these were pasted on and tacked on—on one side of the cask; the other side simply had the stencil mark S. H. & Co. and the destination and number.

X Q. 417. What was the object of pasting that label on a cask that already bore in stencil marks the words "Rahtjen's composition"?

A. Well, it was a guarantee that bearing the signature of Suter Hartmann & Co. it was genuine "Rahtjen's composition."

X Q. 418. If you were the only person at that time making a "Rahtjen's composition" and Suter Hartmann & Co. where the only people selling a Rahtjen's composition, was any guarantee of that description necessary?

A. Well, it was a sort of a caution to the public.

X Q. 419. When, as near as you can tell, did you use or see used labels similar to the Exhibit V?

229 A. I refreshed my mind by talking the matter over with my brother and I now remember that we already got them when making the paint at Bremerhaven.

X Q. 420. In what year?

A. Before I came to England—before 1873, but they were not regularly used there. I later on used them in England.

X Q. 421. In what respect, if any, did the labels that you used in 1873 differ from this "Exhibit V"?

A. I do not think that they differed at all.

X Q. 422. Were they sent to you by Suter Hartmann & Co.?

A. They were.

X Q. 423. And for what purpose?

A. To be pasted and tacked on the casks which we exported.

X Q. 424. Which was the most common way of marking the goods for agents and consumers—by merely stencilling on the casks or by the use of the paper label?

A. On iron drums, stencilling; on casks, stencilling and pasting on.

X Q. 425. If the paper label was tacked and pasted on the head of the cask underneath the stencilled words "Rahtjen's composition," would it not cover and blot out the numbers which would indicate the contents of the cask; that is, the No. 1 or No. 2 or No. 3—whatever the number might be?

A. If the labels were to be tacked on or pasted on the stencilling of the other remarks would be stencilled so high that there was plenty of room for the label.

X Q. 426. The No. 3 or the No. 1, as the case might be, would be above or below the label?

A. Above.

X Q. 427. Then would not the label cover the words, or directions "Stir well before using"?

A. Well, that often was left out in that case if there was no room.

230 X Q. 428. I understand you that you used these labels but to a very limited extent in Bremerhaven?

A. Yes.

X Q. 429. When you came over to Liverpool to what extent did you use them; which was the commonest way of marking the barrels or casks shipped to the defendants or to other consumers—by stencilling merely or by the paper label?

A. When there was time everything was put on that possibly could be put on. In a hurry they were sent off as I said, simply with the contents on them.

X Q. 430. Simply with the stencilling you mean?

A. Yes, with the stencilling as "priming" or "No. 3" or "No. 2"—whatever it was—and the label on.

X Q. 431. Do you mean that in a hurry you marked the vessels containing the composition both by stencilling and also by using the label too?

A. By stencilling the contents on the cask and putting the label on.

X Q. 432. When you were in a hurry you did that?

A. Yes.

X Q. 433. When you were not in a hurry what more did you do?

A. We put everything on that we possibly could put on.

X Q. 434. What more could you put on than that?

A. Stencilling "Rahtjen's composition" and the label. I mean by saying stencilling in a hurry we only put the contents on in stencilling and that label.

X Q. 435. When you did not put the words "Rahtjen's composition" on the casks where did you stencil the number representing the character of the contents of the casks?

A. On the one side.

X Q. 436. On one end of the cask?

A. On one end of the cask.

X Q. 437. But on what part of the one end?

231 A. About the middle.

X Q. 438. And in those cases did you also stencil the words "Stir well before using"?

A. Not always.

X Q. 439. Where did you put the label in those cases where you had stencilled the number representing the character of the contents?

A. Below the mark.

X Q. 440. Below the No. 1 and No. 2 and No. 3?

A. Yes, below those marks.

X Q. 440*a*. Then, of course, in those cases you would not stencil the words, "Stir well before using" because the label would cover them, would it not?

A. The words "Stir well before using" were, as I said, not always put on. When I was in a hurry only the 3 or the 2 or the 1 was put on and nothing else. If there was plenty of time everything was put on that we possibly could get on.

X Q. 441. And during the time that you were making and were shipping this paint in Liverpool was it your ordinary and common and frequent practice to use these labels?

A. Yes.

X Q. 442. And most of the vessels containing the composition which you made in Liverpool were sent out by you bearing those labels. Is that so?

A. Yes.

X Q. 443. For how many years after you arrived in Liverpool and began the manufacture of this composition there did you continue to use these labels?

A. I continued to use these labels as long as I continued making "Rahtjen's compositions."

X Q. 444. That was up to 1880?

A. That was up to 1880 when I transferred the business to Hartmann Bros.

X Q. 445. How soon after the beginning to use these labels on the iron drums did you discover that they were useless because so apt to fall off from the paste drying and not securing them sufficiently to the iron?

232 A. I did not notice it at all. I was informed by Suter Hartmann & Co. that they had fallen off.

X Q. 446. How soon after you began to put them on the drums was it that you were informed by Suter Hartmann & Co. of that?

A. I do not remember that.

X Q. 447. A short time?

A. We used the labels for some time on the drums.

X Q. 448. For about how long?

A. I could not say. I think we soon found it out. It may be six months or it may be a year—I do not remember.

X Q. 449. Do you know when those labels ceased to be used if at all?

A. No, I do not know.

X Q. 450. Do you know whether they or similar labels are in use now by the Suter Hartmann & Rahtjen's Composition Co. or any one?

A. I do not think they are as a trade-mark is now put on.

X Q. 451. What trade-mark?

A. The open hand.

X Q. 452. Were not the labels very liable to be damaged or obliterated on the casks and barrels?

A. I do not think so. The labels were protected by the rims of the casks.

X Q. 453. But in handling the cask in transit or during shipment would not a paper label be very apt to be torn or disfigured or obliterated in some way?

A. That may happen now and then.

X Q. 454. Did you ever ship any casks or barrels bearing this paper label to Hartmann & Co.?

A. To Newcastle?

X Q. 455. Yes.

A. I do not remember where they were sent to.

X Q. 456. Do you remember whether you ever made any shipments to any Hartmann & Co. of Newcastle?

233 A. Yes, I dare say I did.

X Q. 457. Do you remember whether on those shipments there was any paper label on the casks or barrels?

A. I do not remember it.

X Q. 458. Do you remember whether on those shipments there was any stencilling on the casks or barrels of the words "Rahtjen's composition"?

A. As Hartmann & Co. were agents of Suter Hartmann, I dare say they got the casks without much stencilling.

X Q. 459. When you say that you commenced the manufacture in the new factory in Liverpool in the fall of 1874, have you reference to the factory that was built for you?

A. I do not understand the meaning of the question.

X Q. 460. Where was the new factory in which you commenced to manufacture this paint as I understand in January of 1874?

A. Bank Hall lane, Sand Hills, Liverpool.

X Q. 461. Was that the factory which you had built for you to manufacture in?

A. Yes.

X Q. 462. Do you remember what time in 1873 it was that you took possession of that factory?

A. At the very end of 1873.

X Q. 463. In fixing this date as you have today have you consulted any lease or other paper that would help you to be positive about the time?

A. No.

X Q. 464. What have you consulted that leads you to believe now that it was 1873 rather than 1875 as you thought yesterday?

A. I saw a book containing remarks about supplying goods to this factory at the office of Suter Hartmann & Co., who bought various articles for me.

X Q. 465. Were Suter Hartmann & Co. making the stuff themselves at that time?

234 A. No, they simply supplied me some raw material.

X Q. 466. Were they making the stuff just before that?

A. They made nothing.

X Q. 467. I want to know how you know these entries refer to your business and did not relate to theirs if they were making composition about that time or just before that time?

A. I had an account with Suter Hartmann & Co. and I saw the various items booked as supplied to me.

X Q. 468. And in that entry did it show where the goods were shipped?

A. They were sent to Liverpool.

X Q. 469. But did the entry bear the words "Sent to Bank Hall lane, Sand Hills, Liverpool"?

A. No, I had an account, "John Rahtjen, Liverpool, to goods" so and so.

X Q. 470. Could not that have referred to the time that you were making a composition in Liverpool before you had the new factory?

A. No.

X Q. 471. Then you are positive that it was in January, 1874, that you commenced to manufacture and send out this composition from the new factory in Liverpool?

A. To manufacture, yes.

X Q. 472. That is the new factory in Bank Hall lane, Sand Hills?

A. Yes, Bank Hall lane, Sand Hills.

X Q. 473. When did you change your stencils from those bearing the words "Rahtjen's composition" to those bearing the words "Rahtjen's patent composition"?

A. I do not remember.

X Q. 474. Was it about the time that the Heinrich Rahtjen patent was issued?

A. It may be; I do not remember. It was quite immaterial
235 to us whether "Rahtjen's patent composition" was on the casks or packings or "Rahtjen's composition" if only those two words appeared on them.

X Q. 475. But as a matter of fact a time did come when you changed the words "Rahtjen's composition" which you had previously used to the words "Rahtjen's patent composition" on your letter-heads and advertising matters and casks?

A. Yes, very likely.

X Q. 476. You have referred to an occasion when you opened some of the vessels containing this composition at a time subsequent to 1880. Do you remember when that was?

A. I think it was in the second year afterwards, that is, 1882.

X Q. 477. Which was it that you opened, the drums or the casks or the barrels?

A. I had them opened, both drum and cask.

X Q. 478. And how were the drums which you had opened at that time marked? Describe the markings on the drums.

A. What I remember was "Rahtjen's composition" on them and the No. 1, 2 or 3.

X Q. 479. Do you remember which it was, No. 1, 2 or 3?

A. Not much of 1 because only No. 2 and 3 show a great sediment.

X Q. 480. Do you remember whether the head of the drum containing the words "Rahtjen's composition" and the "No. 2" contained anything else on it?

A. I think the other marks were put on when the drums were shipped.

X Q. 481. I am asking you now about your present recollection; carrying your mind back to that occasion, have you a picture before your mind now of the head of this cask as you saw it at that time?

A. Well, I could not well have seen the other end as the
236 one containing "Rahtjen's composition"—that end was taken out and the other end down. We wanted to see what it contained.

X Q. 482. Whichever end you did see can you tell me all that was on that end?

A. I saw "Rahtjen's composition" and the "2" or "3" or "1," whatever so was on it. That is all I remember.

X Q. 483. And you do not remember whether the Roman figures "II" or Roman figures "III" were on it?

A. One was 1 and one was 2 and the other was 3.

X Q. 484. You had two drums opened?

A. We had one of each or two of each opened. I do not remember that now. It is too long ago.

X Q. 485. Did you also have kegs or casks opened at that time?

A. Casks and drums.

X Q. 486. How many casks did you have opened?

A. We never had more at a time than one of each lot opened; that was sufficient.

X Q. 487. You had one drum and one cask opened?

A. Yes, and if there were several lots made we had one cask and such like of each make opened because the make turned out differently—one more and one less faulty.

X Q. 488. I am referring, however, to this occasion that you have mentioned when you came over to Hartmann Bros.' place and inspected this composition?

A. Yes.

X Q. 489. On that occasion you had one drum and one cask opened. Is that correct?

A. Well, often the whole set was made into casks or into drums, whatever it was. I had one package opened of that set which they had come to complain of, whether it was in drums or in casks.

X Q. 490. Which was it in, drums or casks?

A. Whichever turned wrong.

X Q. 491. Can you remember which it was?

A. No, of course I do not remember that.

237 X Q. 492. I am only asking now for your recollection. You do not remember whether it was a cask or drum that was opened?

A. No, whatever turned wrong was opened.

X Q. 493. Is it not a fact that in testifying with regard to the markings on those drums you are testifying more in regard to your recollection of the general course of markings rather than to any picture of those drums that you have now before your eye?

A. I saw that those packages which were opened for my inspection bore the mark "Rahtjen's composition" on them—1, 2 or 3.

X Q. 494. But you do not remember whether it was 1, 2 or 3?

A. I do not remember.

X Q. 495. And all you do remember are the words "Rahtjen's composition"?

A. "Rahtjen's composition" was on them, and the figure to show the contents.

X Q. 496. But you do not remember what that particular figure was?

A. Whether it was 1, 2 or 3 I do not remember.

X Q. 497. It was one of those, but you do not remember which?

A. Quite right.

X Q. 498. On those casks were any paper labels used?

A. No, I think they were put on when they were sent out.

X Q. 499. That is simply the stencilling used on those casks that you saw?

A. Yes, the stencilling—quite right.

X Q. 500. Are you sure that the stencilling on that cask was "Rahtjen's composition"?

Complainant's counsel objects to the phrasing of the question of counsel for defendant in assuming that there was only a single package examined, the witness having testified that there were several of these trip visits and examinations and that he had a separate package of each lot examined on such occasions.

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A. It was either "Rahtjen's patent composition," as long as we had the patent, or "Rahtjen's composition" afterwards.

X Q. 501. But you do not remember which it was as a matter of fact on that cask or keg?

A. During the time the patent was in existence we used the word "patent" and we dropped it afterwards; that is what I remember of it.

X Q. 502. I am asking you now, however, in regard to your recollection of that visit when you made an inspection of the contents of this drum, or cask, or both; and I am asking you whether you remember that the words on that cask were simply "Rahtjen's composition," or whether they might not have been "Rahtjen's patent composition."

A. Well, I did not make any difference—I did not know any difference.

Same objection by counsel for complainant as to the phrasing of the question.

X Q. 503. On how many occasions did you make an inspection of the goods for Hartmann Bros.?

A. When they thought that there was a fault in the composition they wired or wrote me to come over.

X Q. 504. And how many times did you come over and make an inspection?

A. I do not remember that; it might have been in the second year, twice or three times, and perhaps twice or three times in the next year—I do not remember.

X Q. 505. You have no distinct recollection of the number of times that you came?

A. No, I have not.

X Q. 506. And you have no distinct recollection of any particular event occurring in regard to the inspection on one occasion that did not occur on the others?

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A. I have not.

X Q. 507. So that no particular visit stands out with more distinctness before your mind?

A. No. I only came when Hartmann Bros. considered it necessary for me to inspect the paint.

(Adjourned till half past two o'clock p. m. to the same place.)

1ST SEPTEMBER, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

Recross-examination of Mr. JOHN RAHTJEN, by Mr. McMASTER, resumed:

X Q. 508. Will you produce the assignment to Hartmann Bros. of 1880 and the agreement with them of 1880 reserving royalty?

A. I will and I do so. The agreement is dated February, 1880, and I think the assignment is of the same date.

X Q. 509. Have you any objection to putting in evidence the original papers themselves?

A. I prefer to keep them, but I have procured and hereby furnish true copies of them, omitting prices and considerations.

Defendant's counsel offers in evidence the copy of the assignment of the Rahtjen patent from the firm of John Rahtjen to the firm of Hartmann Bros., dated 1880, and the same is marked "Defendant's Exhibit Assignment Rahtjen's Patent.

Objected to as incompetent, irrelevant and immaterial.

Defendant's counsel desiring the agreement also placed in evidence, complainant's counsel states that in order to prevent duplicating exhibits the same will be introduced in evidence by
240 him before the close of the case as part 1 of the first schedule of an assignment from Suter Hartmann & Co. and others to Suter Hartmann and Rahtjen's Composition Co., Ltd., and that for the purposes of this examination, this agreement may be treated as now in evidence, as though it had already been introduced in evidence by defendant's counsel.

X Q. 510. Prior to the execution of these documents your firm had made a contract by correspondence with James Suter & Co., as I understand, in regard to the sale or handling of "Rahtjen's composition" in England, had you not?

A. There was scarcely any correspondence with James Suter & Co.

X Q. 511. You have not, however, produced such correspondence?

A. I have not. I did not come across it.

X Q. 512. Have you looked for such correspondence, or had a search made for such correspondence since you have been under examination in this case?

A. Yes. I have been looking through all the books that were left.

X Q. 513. Whose books?

A. All the copying books of the firm of John Rahtjen, Bremerhaven.

X Q. 514. Since you have been under examination have you had a search made for those papers?

A. No, I have not; but a search has been made for me in London among the papers in the possession of Suter Hartmann & Rahtjen's Composition Co., Ltd., but no such letters can be found.

Defendant's counsel objects to the latter part of the answer after the words "No, I have not," as not responsive.

X Q. 515. Were these documents which you have produced the first grant of the right to manufacture and sell the Rahtjen's composition?

241 A. Yes, they were the first documents for the right to manufacture and sell Rahtjen's composition, but the right to sell Rahtjen's composition was given long before to Suter Hartmann & Co.

X Q. 516. Referring to the labels which you say were sent you to put on the casks, barrels, and the like containing this Rahtjen composition, were they sent to you in any letter or did any communication accompany them?

A. They were not sent in a letter, they being big parcels.

X Q. 517. Did you have any correspondence with Suter Hartmann & Co. in regard to those labels?

A. So far as I remember, Suter Hartmann & Co. requested us to use these labels on the goods which were exported for their account.

X Q. 518. Did they request you in writing to use them?

A. No doubt; I do not remember the letter, but I am certain that a letter has been written on the subject.

X Q. 519. Will you look among your own papers or the papers of Suter Hartmann & Co., which I understand are not in the possession of Suter Hartmann & Rahtjen's Composition Co., Ltd., and see if you can find such letter, and if so, have it produced before the close of the examination?

A. I will do so.

Redirect examination by Mr. MERWIN:

Q. 520. Whatever instructions may have been given and however given, the fact however is, as I understand it, that you did receive labels of this character from Suter Hartmann & Co. while you were manufacturing Rahtjen's composition in Germany and exporting to them in England, and that you did put those labels upon the packages at their request.

Objected to as leading and also on the ground that a proper foundation for the question has not yet been laid.

242 A. I received the labels and I used them.

Q. 521. How did you use them?

A. By pasting them on the packages which contained Rathjen's composition.

Q. 522. You said in answer to a question in cross-examination that Hartmann Bros. were the first to acquire from you the right to manufacture and sell Rahtjen's composition. What do you mean by their right to sell?

Objected to if it is intended thereby to vary the written instrument or the meaning thereof already introduced in evidence.

(Complainant's counsel state that it is not desired to vary the meaning of the instrument, but to explain the answer of the witness.)

A. Suter Hartmann & Co. being the sole consignees for the sale of Rahtjen composition, Hartmann Bros. had not the right to sell to anybody else.

Q. 523. Paragraph 17 of the agreement with Hartmann Bros. which is in evidence, is as follows: "The said purchasers shall not without the consent in writing of the said vendors and the said George Frederick Heyl part with the said letters patent or the good will of the said business nor shall they disclose or make known to any one the mode of manufacturing the said paint or the secret thereof or any of the processes relating thereto." To what secrets or secret processes does this refer?

Objected to as not proper redirect examination and furthermore that the instrument itself is the best evidence.

A. When the agreement with Hartmann Bros. giving them the right to manufacture Rahtjen's composition was made, a secret process besides that as specified in the patent was given them.

243 Q. 524. Was that a secret which you had been using in the manufacture of Rahtjen's composition before that time?

Same objection, and furthermore as leading.

A. The secret has been used before and even after.

Q. 525. How long before had you been using it?

Same objection.

A. I could not tell you how long before.

Q. 526. State generally as near as you can. Was it for a month or for one year or for several years?

Same objection.

A. It may have been only a short time before the agreement was made.

HEINRICH RAHTJEN, a witness produced on the part of complainant, being first duly sworn, deposes and says in answer to questions propounded to him by Mr. Merwin:

Q. 1. State your age, residence and business.

A. 55 years; I live in Bremerhaven; I am partner of the firm of John Rahtjen, manufacturer of the Rahtjen's compositions.

Q. 2. I show you Complainant's Exhibit Q. Who wrote this?

Objected to on the ground previously taken, namely, that said paper purports to be a letter-press copy of a letter written to Mr. Gelien, which said letter has not been produced or its absence satisfactorily accounted for, and hence said letter and examination concerning same is secondary evidence. This objection is continued as to subsequent questions on this line of examination with the same force as if repeated after each question.

244 A. I did.

Q. 3. Who signed it?

A. I did.

Q. 4. How long have you been in the business of manufacturing Rahtjen's compositions?

A. Since 1866.

Q. 5. How were you engaged in the business in November, 1869?

A. At that time I was with my father, and in 1873 I was partner of the firm.

Q. 6. How long have you been partner in the firm?

A. Since 1873 till now.

Q. 7. How were the barrels or casks of Rahtjen's compositions marked that were sent to Gelien and Hartmann, Le Doux & Maecker by you?

Objected to as no proper foundation has been laid for the question.

A. Those to Gelien, on the one side with "H. G." and the number and "Hoboken," and on the other side "Rahtjen's composition" or "Rahtjen's patent composition," and those to Hartmann Le Doux & Maecker on one side "H. Le D. & M., New York," and on the other side "Rahtjen's composition" or "Rahtjen's patent composition."

(Adjourned to Monday, 4th September at 11 o'clock a. m., to the same place.)

Mr. AUGUST HARTMANN, a witness produced on the part of complainant, being first duly sworn, deposes and says in answer to questions propounded to him by Mr. Merwin:

Q. 1. Please state your age, residence and occupation.

A. I am forty-two years of age, director of the present company, Suter, Hartmann & Rahtjen's Composition Company, Limited, and my residence is Netherfield house, Weybridge, Surrey.

245 Q. 2. State whether or not you were ever connected with the firm of Hartmann Brothers, London?

A. Yes.

Q. 3. In what capacity?

A. I was one of the partners when the firm of Hartmann Brothers was formed.

Q. 4. What particular branch or part of the business of that firm were you specially connected or familiar with?

A. Perhaps of us brothers I had more to do with the active management of the factory of Hartmann Brothers.

Q. 5. Do you know how the barrels, casks, and drums of Rahtjen's composition as manufactured by your firm were generally marked?

A. Yes, I have a good recollection of it.

Q. 6. I show you "Complainant's Exhibit K. K." Referring to the second photograph, please state how many different stencils were used to make up that one photograph?

A. Eight different stencils shown on that photo, taking the number of "150" as one stencil.

Q. 7. Please give the matter that was on each stencil?

A. "Rahtjen's anti-fouling composition," first; "Remove head and stir well before using," second; "III," in the centre, third;

"S. H. & Co.," fourth; "150," fifth; "Trieste," sixth; "III," seventh; "Stir well before using," eighth.

Q. 8. How was the stencil, "Stir well before using" at the bottom of the photograph used?

A. It would be used in place of the one marked "Remove head and stir well before using," sometimes.

Q. 9. Then the two stencils at the bottom of the photograph would be used instead of the stencil of the three numerals, and the half circle, "Remove head and stir well before using" near the top of the photograph?

246 A. Yes, and very probably the use would be there when a barrel was marked or a drum was marked.

Q. 10. Then these photographs do not purport to be exact photographs of the prints upon any one package, but rather of the separate stencils grouped in the ordinary way, or a variety of ways?

Objected to as leading.

A. Certainly.

Q. 11. How were the packages containing Rahtjen's composition manufactured by Hartmann Brothers, which were shipped to agents in the United States, marked, distinguishing the marks before the house of the red-hand brand from those used afterwards?

A. I should say they were marked according to these stencils.

Q. 12. Were the stencils shown in photographs 1 and 2 of this exhibit used upon packages of Rahtjen's composition of your firm's manufacture which were sent to the United States before 1883?

A. Yes, to the best of my recollection they were.

Q. 13. You were familiar with the goods as they went out from your factory, were you not?

A. Yes.

Q. 14. What was the direction to workmen with reference to marking such packages?

A. Very careful instructions were given to the workmen to mark all packages intended for export outside our own agents very carefully with these stencils, but in the instances of our own agents sometimes some of these stencils were omitted.

Q. 15. What do you mean by your own agents? Did you ship to any but your own agents?

A. Yes, we had shipments direct to steamship companies for export, who would not be acting as our agents.

Q. 16. How about goods that were shipped to your agents in the United States, would they be marked with the same care as though they were shipped to other parties abroad?

247 A. I should think they would be marked the same as if they were ordinarily intended for export.

Q. 17. Then more care was exercised by you in reference to goods for export than in reference to those for agents in England?

Objected to as leading.

A. Certainly.

Q. 18. Did you know the firm of Suter Hartmann & Co., of London & Liverpool, from the year 1871 to the year 1888?

A. I know the firm from 1873.

Q. 19. State if you were ever connected with that firm?

A. I became a partner in the firm of Suter Hartmann & Company of London in 1878, but was not a partner in the firm of Liverpool.

Q. 20. State whether or not to your own personal knowledge as the rule and course of business, packages of Rahtjen's composition from Suter Hartmann & Company which were shipped to the United States from 1879 to 1891 were marked with any stencil or otherwise with the word "Rahtjen's."

Objected to as leading.

A. I should say packages were marked with the name of "Rahtjen's" the same as for other export trade.

Cross-examination by Mr. McMASTER:

X Q. 21. You are a shareholder or stockholder in the Suter Hartmann & Rahtjen's Composition Company, Limited, and also in the Rahtjen's American Composition Company, are you not?

A. I am.

X Q. 22. You do not know when these photographs were taken or by whom they were taken, do you?

A. I have no positive recollection, but I should think that they were taken some time when our business was sifting the
248 question of our trade-marks—how we stood towards our various opponents in the market—and for that purpose they were prepared.

X Q. 23. And that would be about the time of the formation of the Suter Hartmann & Rathjen's Composition Company, would it not?

A. I should think so.

X Q. 24. I will ask you the same question that I asked your brother in reference to the upper half of the first photograph, namely, whether it is not probable that in grouping the several stencils going to the form of marking on this other half the stencil containing the word "priming" has not been used inadvertently instead of, say, the "No. 3."

A. No; I am quite clear on this point; my recollection is that "Rahtjen's anti-fouling composition" formed the general designation for composition and was called so by us in all our circulars, and this stencil was put on all casks and kegs, with only this difference, that where it was priming, the head of the cask would be white, and "priming" would be stenciled in the centre.

X Q. 25. In this photograph the stencilling of the word "priming" is not shown in the centre. Is that a correct position for it and does it correctly represent the position of the word as you placed it on the casks or barrels?

A. In this photograph it is not exactly in the centre; it should be in the centre.

X Q. 26. Now, referring to photograph No. 2 of the series and the latter half of that photograph, is it not a fact that the letters "S. H. & Co." then underneath the numerals "150," and underneath that the word "Trieste," constitute the makings on one end of the cask or barrel?

A. Yes.

X Q. 27. And is it not a fact that the three bars or numerals and the words "Stir well before using" constituted the makings on the other end of the cask or barrel as you marked them?

249 A. No, I should not say so. I should say that this "III, stir well before using," would be used in place of the "III" above, and "Remove head and stir well before using," in connection with "Rahtjen's anti-fouling composition."

X Q. 28. Now compare the upper of the two barrel heads shown on the photograph, "Defendant's Exhibit Photograph of Barrel Heads," with the markings shown on the lower half of the second photograph, and let me ask you if you do not find on the barrel head shown in the upper right-hand corner of the photograph the letters "S. H. & Co.," then the running mark, and then the port mark, the same as you find them on the upper part of the lower half of the second photograph?

A. Yes. I consider these marks are correct.

X Q. 29. Now comparing the markings on the barrel head shown in the upper left-hand corner of the Defendant's Exhibit Photograph of Barrel Head with the three numerals and the words "Stir well before using," shown on the lower quarter of the second photograph, do you not find that they compare?

A. Yes.

Redirect examination by Mr. MERWIN:

R. D. Q. 30. What, if anything, would ordinarily be used in addition to the markings on the bottom of the second photograph when placed upon a barrel head as shown in the upper left-hand corner of the Defendant's Exhibit Photograph?

A. I should say the stencil mark, "Rahtjen's anti-fouling composition." (Pointing to that at the top of the photograph.)

R. D. Q. 31. Referring to the picture of a barrel head at the lower left-hand corner of the Defendant's Exhibit Photograph, what would ordinarily and in the usual course of business be placed upon the barrel head in addition to the words "Priming, stir well before using," if anything?

250 A. I repeat the same answer—"Rahtjen's anti-fouling composition," which was the usual designation.

R. D. Q. 32. You have spoken of greater care or attention being paid to the marking of goods for export than when sent to your agents in England. What do you mean by that?

Objected to as not proper redirect examination.

A. I mean that our own agents would use the term of only No. 1 and No. 3, and it may have been that when it was sent to our own

agents in England, all these stencils were not used with the same care and regularity as they would be for our export trade.

R. D. Q. 33. You mean therefore that the stencil mark "Rahtjen's anti-fouling composition" might have been left off from the barrel heads shown in the photograph?

Objected to on the same ground as before, and as leading.

A. Yes, in the case of our own agents.

R. D. Q. 34. Would the shipment to South Shields have been to one of the firm's agents?

A. Yes.

R. D. Q. 35. Where is South Shields?

A. It is on the Tyne, in England.

AUGUST HARTMANN.

Evidence in sur-surrebuttal produced by complainant's counsel upon the closing of defendant's surrebuttal case, subject to the objections made to the introduction of such surrebuttal evidence by defendant and without waiving objection to the admission of any surrebuttal evidence, and subject to be stricken from the record in case such surrebuttal evidence shall be also stricken from the
251 record. It being proposed to prove by witness Richard Le Doux that the statements in surrebuttal of the witness A. C. Holzapfel with reference to the use of labels upon the goods manufactured by Suter, Hartmann & Company in the year 1874 are incorrect.

RICHARD LE DOUX, a witness produced on the part of the complainant, being first duly sworn, deposes as follows, and says in answer to questions propounded by Mr. Merwin:

Q. 1. State your age, residence and occupation?

A. Fifty; Marfield, West Derby, Liverpool; merchant and naturalized Englishman.

Q. 2. State whether you knew the firm of Suter, Hartmann & Company in Liverpool in the years 1873 and 1874?

A. Yes, I went to Liverpool for the firm of Suter, Hartmann & Company as manager in 1871. Before, I was traveller, and afterwards manager. In 1871 I painted the first ship, the "Olinda," with Rahtjen's composition.

Q. 3. State whether or not you were at any time a partner in that firm?

A. We opened the office in Liverpool in 1872 and I became partner in June, 1873.

Q. 4. State whether or not this firm of Suter, Hartmann & Company at Liverpool did any manufacturing, partially or wholly, of Rahtjen's composition; and, if so, when?

A. I believe it was at the end of 1873. The customs stopped the importation of the composition from Germany, because it contained spirit of wine, and after that we imported the composition in paste, and added the necessary dissolvents to it.

Q. 5. During the time when your firm so finished the manufacture

of Rahtjen's composition in the year 1874, state how it was
252 your rule and custom to mark the packages containing this composition for sale or export so as to indicate the contents of the packages?

A. In a rough and ready way; the packages were put up mostly in petroleum barrels weighing about 4½ cwt., and were simply marked with the name of the company, the number, and the label, of Suter, Hartmann & Company, which were sent at that time from Basinghall street.

Q. 6. I show you Complainant's Exhibit V; state whether or not the labels used by you were in any respect similar to this?

Objected to as leading.

A. Yes, excepting the address is wrong, it is 18 Billiter street. It is the same style of label.

Q. 7. Was there a heading upon that label so used by you?

Objected to as leading.

A. The same heading as that.

Q. 8. Do you know Mr. A. C. Holzapfel who has testified in this case?

A. Very well, indeed.

Q. 9. Was he ever in your employ?

A. Yes.

Q. 10. Was he in your employ at the time when you were partially or wholly manufacturing Rahtjen's composition?

A. Yes.

Q. 11. State whether or not to your knowledge he knew of the use of labels of this character upon the packages?

A. He ought to.

Q. 12. Why ought he to?

A. He *entered* (handled) a great many of them and tacked a great many on.

Q. 13. How do you know he tacked them on?

253 A. On one occasion he put them on badly; I put him aside and put them on myself and showed him what to do with them.

Q. 14. How were they badly put on?

A. They were puckered up. There is one nail at each corner and one in the middle of the label, and if the nails are not put on straight the paper is liable to pucker up, it being thin paper.

RICHARD LE DOUX.

Rebuttal proofs for complainant for final hearing continued before Benjamin Barker, special examiner, at his office, 120 Broadway, New York city, N. Y., this 13th day of October, 1899, commencing at 11 o'clock a. m., pursuant to stipulation and without other notice, such notice being waived.

Present: T. D. Merwin, Esq., of counsel for complainant, and R. B. McMaster, Esq., of counsel for defendant.

JOHN L. CLARK, a witness produced on behalf of complainant, being first duly sworn, deposes and says, in answer to questions propounded to him by Mr. Merwin:

Q. 1. Please state your name, age, residence and business.
A. John L. Clark; residence, 146 Decatur street; age, 40 years; business, painting.
Q. 2. How long have you been in your present business?
A. About twenty-three years.
Q. 3. With whom have you been engaged in business during this time?
A. My father, David Clark.
Q. 4. At what business address?
A. In South street, up to about nine years ago; now 746 Third avenue, Brooklyn, N. Y.
254 Q. 5. At what number on South street was your place of business prior to nine years ago?
A. 256 South street.
Q. 6. During the years 1886 to 1888, inclusive, were you acquainted with a Mr. Emil Maecker?
A. Yes, sir.
Q. 7. Did your father during that time have any business connection with Mr. Maecker, and if so, what was it?
A. He received the agency of the "Rahtjen's composition" for New York city.

Defendant's counsel objects to the answer on the grounds that the facts attempted to be proven thereby are not properly rebutting testimony.

(Witness is shown Complainant's Exhibit C C.)

Q. 8. Please look at this circular marked "1;" to whom does that circular refer?

Defendant's counsel objects to this question and all other questions on this line of examination, or relating thereto, on the same grounds as stated in the objection to the last answer, and it is understood by counsel that this objection continues to future questions and answers without being specifically repeated.

A. To David Clark, my father.
Q. 9. How long did your father's agency under Mr. Maecker continue?
A. I, well, I can't think exactly now; it seems to me three or four years. We applied the paint for several years.
Q. 10. Have you any bills or vouchers for "Rahtjen's composition" from Mr. Maecker to your father during the time when your father was his agent, and if so, will you produce them?
A. Yes, sir. (Witnesses produces two papers.)

255 Counsel for complainant offers the bills produced by the witness in evidence, and the same are received and marked "Complainant's Exhibit L. L. 1 and 2 respectively, B. B., ex'r."

Defendant's counsel objects to the acceptance in evidence of the

said exhibits on the same grounds as those heretofore stated, namely, as not proper rebutting testimony.

Q. 11. Have you any letter or bill heads such as were used by your father while agent for Mr. Maecker, and if so, please produce one?

A. Yes, sir. (Witness hands paper to counsel.)

Complainant's counsel offers in evidence the bill-head produced by witness, and the same is received and marked "Complainant's Exhibit M M, B. B., ex'r."

Defendant's counsel objects to the acceptance in evidence of this exhibit on the same ground as those last stated.

Q. 12. In what sort of packages was the "Rahtjen's composition" which your father bought of Mr. Maecker, as his agent, put up?

A. There was a sheet-iron drum holding ten gallons and a half in every package.

Q. 13. With what name, if any, designating the contents of the drums were they marked?

In addition to the objections heretofore taken, defendant's counsel further objects to this question as calling for secondary evidence, the drums themselves and the markings thereon being the best evidence.

A. The mark on the can was a red hand and Rahtjen's paint, and was designated as No. 1 and No. 3; No. 1 was a white-head drum and No. 3 was a black.

256 Q. 14. The name "Rahtjen" then was marked upon the drum?

A. Yes.

Q. 15. How was it marked, by stenciling, label, or by what means?

A. It was marked by stenciling right on the drum.

Q. 16. Was the word "composition" stenciled on the drum, or the words "Rahtjen's composition"?

In addition to the objections heretofore taken defendant's counsel further objects to this question as leading.

A. "Rahtjen's composition."

Cross-examination by Mr. McMASTER, subject to objections heretofore taken:

X Q. 17. How long is it since you have seen one of the drums with the markings thereon as furnished to your father?

A. I have not seen them since we had the agency. After Mr. Petersen took the agency I paid no attention to the marks. I knew I was getting the Rahtjen's paint, but I paid no attention.

X Q. 18. Do you remember whether the name of the maker or manufacturer was on the can or cans which your father received as agent?

A. Well, there was a name on there, I think it was Hartmann, Ledoux & Maecker.

X Q. 19. Did you ever see any paper labels on these drums?
A. No, sir, it was stenciled right on the cans.
X Q. 20. At the time that your father had the agency for New York city under Maecker, did you know of any one else selling or dealing in a Rahtjen's composition in this market?

Complainant's counsel objects to the question as improper on cross-examination, because tending to draw out evidence not in
257 any way related to the evidence produced on direct examination, and therefore shall insist upon the right, subject to the foregoing objection, to treat any evidence adduced in answer to such question as part of defendant's evidence, and the witness as defendant's witness, and to cross-examine him thereon.
Defendant's counsel withdraws the question.

X Q. 21. Did you ever hear of a Rahtjen's composition manufactured by Holzapfels and sold in the New York market?

Same objection.

A. Yes, sir.
X Q. 22. Do you know Mr. John A. Donald, here present?
A. Yes, sir.
X Q. 23. He or his firm of John A. Donald & Company, were agents for the Rahtjen's composition, Holzapfel's manufacture in this market, were they not?

Same objection as to X Q.'s 20 and 21.

A. Mr. Donald told me he could sell me the Holzapfel's Rahtjen's paint at any time I wanted it.
X Q. 24. About how many years ago was this?

Same objection.

A. Well, now, I don't know. I suppose twelve or thirteen years ago.
X Q. 25. Did you understand that the composition that you got from Maecker was made in this country or abroad?
A. Made abroad, sir.
X Q. 26. Do you remember by whom?
A. No, sir; I don't know who made it there. I know only that Hartmann, Ledoux & Maecker were on the cans, and I supposed they made it.

258 Redirect examination and cross-examination by Mr. MERWIN as to the evidence adduced in answer to Q.'s 20, 21, 23, and 24:

R. D. Q. 27. When Mr. Donald told you he could sell you a Rahtjen's paint, as an inducement to you to buy it did he say it was the same or as good as the "Rahtjen's composition" which you got of Mr. Maecker?
A. He told me it was the same article, made by the same firm, and that they had dissolved partnership, or something of that kind.

Not made by the same firm. He gave me to understand that it was the same article, but that the firm had dissolved partnership.

R. D. Q. 28. Did he offer to sell you the paint at a less price than Mr. Maecker charged you for the "Rahtjen's composition"?

A. He wanted me to take an interest in it. Yes, he did.

R. D. Q. 29. In answer to X Q. 17 you stated that after Mr. Petersen took the agency you knew you were getting the Rahtjen's paint. Was the "Rahtjen's composition" which you got after Mr. Petersen had the agency put up in the same kind of drums and marked with the words "Rahtjen's composition" in substantially the same manner as it had been when you bought it of Mr. Maecker?

Objected to as leading and instructive, and on the further ground that the witness has already testified that after Mr. Petersen took the agency he paid no attention to the mark.

A. Yes, just right after he took the agency.

R. D. Q. 30. Have you now in your possession, or do you know where there are any of the drums which you received from Mr. Maecker during the time your father was his agent?

259 A. I could locate a couple of drums, I think, but they are so painted over that the marks are obliterated.

R. D. Q. 31. Will you please make careful search and see if you can find any, and advise me of the fact if you do so that I may produce them in evidence?

A. Yes.

Recross-examination by Mr. McMASTER:

R. X Q. 32. When Mr. Donald solicited you to buy the Rahtjen's composition made by Holzapfel was not what he told you as follows: That it was made according to the same formulæ as the Rahtjen's composition which you were familiar with?

Same objection as to X Q.'s 20, 21, 23, and 24.

A. Yes, sir; that was his idea of it.

R. X Q. 33. You knew at the time, did you not, that the Rahtjen's composition Holzapfel's manufacture, which Mr. Donald solicited you to buy, was not made by the same firm or manufacturer who had made the Rahtjen's composition with which you were familiar?

Same objection.

A. Well, being different firms, no, I never thought it was the same people who were manufacturing the paint.

R. X Q. 34. And you did not intend in your testimony to be understood that Mr. Donald represented to you that it was the same people who were making the paint?

A. No; the same formula.

R. X Q. 35. You knew then that there were two rival establishments making the paint, but understood that the paint made by both were from the same formula?

A. Mr. Donald gave me to understand that.

JOHN L. CLARK.

260 Complainant's counsel offers in evidence a certified copy of assignment in writing by Hartmann, Ledoux & Maecker to Hartmann Brothers, dated July 8, 1885, of the trade-mark No. 12336, dated June 23, 1885, and the same is received in evidence and marked "Complainant's Exhibit N N, B. B., ex'r."

Defendant's counsel objects to the reception in evidence of said assignment on the ground that the same is not properly rebutting testimony, and further that it is not properly proven.

Complainant's counsel also offers in evidence certified copy of an assignment in writing from Hartmann Brothers to Suter, Hartmann & Rahtjen Composition Company, Limited, of the same trade-mark, dated October 10, 1888, and the same is received and marked "Complainant's Exhibit O O, B. B., ex'r."

Defendant's counsel objects to the reception in evidence of the said paper on the ground that it is not proper rebutting testimony.

Complainant's counsel also offers in evidence a true copy of a certain agreement, dated October 31, 1891, between Suter, Hartmann & Rahtjen's Composition Company, Limited, and the Rahtjen's American Composition Company, with certain prices and considerations omitted, and the same is received in evidence with the same force and effect as if the original thereof was produced and placed in evidence, and is marked "Complainant's Exhibit P P, B. B., ex'r."

Defendant's counsel objects to the reception in evidence of the said paper on the ground that it is not proper rebutting testimony.

Adjourned to Monday, October 16th, 1899, at 11 a. m., at the same place.

261 NEW YORK, *October* 16, 1899—11 a. m.

Met pursuant to adjournment.

Present: Counsel as before.

HENRY GELIEN, being first duly sworn, deposes and says in answer to questions propounded by Mr. Merwin:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Henry Gelien; my age, 72 years; residence, Highwood Park, N. J.; occupation, boss painter.

Q. 2. What was your business during the years 1869 to 1870?

A. My business was boss ship painter, principally for North German Lloyd and Hamburg-American line. I was the senior partner of Gelien & Brickenstein.

Q. 3. Were you, during those years, the agent for any kind of composition for ships' bottoms?

A. Yes, I was agent, besides my business with Brickenstein. I carried on special business for selling composition paint.

Q. 4. What was the name of the composition paint which you sold?

A. It was "Rahtjen's composition" paint.

Defendant's counsel objects to the last answer on the ground that the facts attempted to be proven thereby are not properly rebutting testimony.

Q. 5. Whose agent were you in the sale of this composition paint?

Defendant's counsel objects to this question on the same ground as stated in the objection to the preceding answer, namely,
262 that it is not proper rebutting testimony, and it is agreed between counsel that this objection shall continue to all questions and answers relating to the handling of said composition by the witness with the same force and effect as if made to each question or answer.

A. John Rahtjen's, Bremerhaven.

Q. 6. About when did your regular business as such agent commence in the buying and selling of "Rahtjen's composition"?

A. In 1871.

Q. 7. How was the agency business agreed upon between you, by written contract or by correspondence?

A. By correspondence.

Q. 8. Please examine the press copy of letter, being "Complainant's Exhibit Q," and state whether or not you remember receiving the original of the same?

Defendant's counsel objects to the question as calling for secondary evidence, the original letter being the best evidence.

A. I presume I have received it.

Q. 9. State whether or not you remember of receiving a letter having substantially the contents of this letter?

A. I presume I received a letter of which this is a press copy.

Q. 10. Have you the original of this letter at present?

A. Not now.

Q. 11. Have you made careful search to find the original of this letter?

A. I have been making a careful search, but I cannot find anything.

Q. 12. (Witness is shown Complainant's Exhibit *Exhibit* S.) State whether or not that is the form of letter-head you used while you were Mr. John Rahtjen's agent?

263 A. Yes, sir, that is the form I used.

Q. 13. (Witness is shown Complainant's Exhibit U.) Please examine these letters and say whose signature is attached to them?

A. My own signature.

Q. 14. (Witness is shown Complainant's Exhibit R.) What is this document?

A. It is a show-card.

Q. 15. Whose show-card?

A. Mine. I had it printed for my own benefit and use.

Q. 16. What use did you make of these show-cards?

A. Distributed them among the shipping merchants. Had them framed and sent to dry docks, &c. (Pointing to the show-card.) These on the show-card were my customers at the time.

Q. 17. Please state, as nearly as you can, the amount in dollars of Rahtjen's compositions which you bought of Mr. John Rahtjen from 1871 to 1877 inclusive?

Objected to by defendant's counsel as calling for secondary evidence, the books or records of the witness being the best evidence on the points inquired about by the question.

A. About $17,500.

Q. 18. Have you the original record of the invoices which you received from him for these shipments?

A. I have the record, but not the original invoices.

Q. 19. What became of the original invoices?

A. They are in the custom-house.

(Witness produces the leaves taken from his invoice book, being pages 1 to 18 inclusive.)

264 Q. 20. Are these true copies of the invoices received during those years from John Rahtjen of Rahtjen's composition?

Same objection.

A. Yes, they are.

Complainant's counsel offers the leaves from said invoice book in evidence, having particular reference to pages 1 to 11 inclusive, and 14 to 17 inclusive, and the same are received and marked "Complainant's Exhibit Q Q. B. B., ex'r."

Defendant's counsel objects to the receptance in evidence of the invoices as secondary evidence.

Q. 21. State whether or not the terms of your agency for Mr. John Rahtjen during the years mentioned were in substantial accordance with the letter of Nov. 13, 1869?

Objected to as calling for secondary evidence.

A. Yes, sir, that was the start of the correspondence in regard to the agency.

Q. 22. Have you made careful search for the rest of the correspondence in relation to taking this agency, and if so, have you found anything?

A. With a careful search I have found nothing.

Cross-examination by Mr. McMASTER, not waiving the objections to the prior deposition heretofore taken that the same is not proper rebutting testimony, and further objections taken to specific questions:

X Q. 23. Your first shipment of composition from John Rahtjen was for how much and was received when?

A. (Witness referring to the copy of his invoice.) The first shipment from John Rahtjen was made in May, 1871, amounting to $573, embracing 5 casks of composition paint.

265 X Q. 24. How many other shipments of composition did you receive from John Rahtjen during the year 1871, and for how many casks of composition were they?

A. The second was June 27, 1871, for 7 casks, $742.75; next, July 7, 1871, for 13 casks, $1,116.75.

X Q. 25. How many casks of composition did you receive from him in 1872, and under what date?

A. July 4, 1872, 10 casks, amount $829.05.

HENRY GELIEN.

OTTO L. PETERSEN, having previously been called and having testified in this proceeding, being again produced on the part of complainant, deposes and says in answer to questions propounded to him by Mr. Merwin:

Q. 1. You are the Otto L. Petersen who has previously testified in this suit?

A. I am.

Q. 2. Did you hear, or have you read, the testimony of Mr. Andresen, on behalf of the defendant in this suit?

A. Yes.

Q. 3. After hearing his testimony do you desire to qualify or change the testimony which you gave as part of complainant's evidence-in-chief to the effect that you had no recollection of any competition on the part of the defendant company with you as agent of the Suter Hartmann & Rahtjen's Composition Company, Limited, or as president of the complainant company in the sale of so-called "Rahtjen's composition" prior to the — 1896?

A. I wish my testimony as heretofore given to stand exactly as it is.

Q. 4. Do you know the vessels "Rhone," "Star of the East," "Dorian," "Sidonian," "Tyrian" and "Wynnstay"?

266 A. I have heard of them. In fact I am familiar with the vessels.

Q. 5. Are they large or small vessels, relatively, as compared with the ships of the United States Navy and those of the great ocean line steamship companies?

A. Very small in comparison to them.

Q. 6. If you had had the contracts for cleaning and painting the bottoms of Star of the East, the Dorian, Sidonian, Tyrian, Rhone and Wynnstay in the years 1889, 1890 or 1891, in the usual manner and at your usual prices, about how much profit would there have been to you, or the company you represented, on the same?

Objected to as immaterial and irrelevant, and as not rebutting testimony.

A. $200 would about cover the whole profit.

Q. 7. State whether or not you have made careful search for any letter-heads, bill-heads, circulars, or other advertising matter, or drums in which "Rahtjen's composition" had been put up, of any of the agents or manufacturers of "Rahtjen's composition" of a date prior to the time when you became agent for the sale of the same, and if so, whether you have found any?

Defendant's counsel objects to the question as not proper in rebuttal.

A. I have made careful search, and I found nothing.

Q. 8. About when did you become agent for the Suter, Hartmann & Rahtjen's Composition Company, Limited, for the sale of "Rahtjen's compositions" in the United States?

Same objections.

A. The beginning of 1889.

267 Q. 9. What is the earliest record which you have of any bid for or sale of "Rahtjen's composition" by you as such agent?

Objected to as not proper rebutting testimony.

A. The 29th of January, 1889.

Q. 10. What is the record to which you refer?

Same objection.

A. Press copy of letter to Messrs. Darrah & Elwell.

Defendant's counsel further objects on the ground that the same is secondary evidence.

Complainant's counsel offers in evidence the press copy of letter produced by witness, and the same is received and marked "Complainant's Exhibit R R, B. B., ex'r."

Defendant's counsel objects to the receptance in evidence of said exhibit on the ground that the same is secondary evidence, and furthermore, as not proper rebutting evidence.

Q. 11. Whom did you succeed in that agency?

Objected to as not proper rebuttal.

A. Emil Maecker.

Q. 12. When you succeeded him as agent for "Rahtjen's composition" did he turn over to you any "Rahtjen's composition"?

Same objection.

A. He did.

Q. 13. In what kind of packages were the compositions contained, barrels or drums?

Same objection.

A. Metal drums.

268 Q. 14. Was there any descriptive name of the contents of these drums placed upon them, and if so, what was it?

Same objection and as calling for secondary evidence.

A. There was on the head of the drums, (some of them were white painted and some of them were black painted,) the directions marked "Stir well before using." On the sides were marked "Rahtjen's composition."

Q. 15. State whether or not you have personally examined original files of the New York Maritime Register for the years 1892, 1893, 1894 and 1895, and if so, whether there was to be found in any of the copies of said journal during those years any advertisement

of "Rahtjen's composition" by either the defendant corporation or John A. Donald, or John A. Donald & Co., as agents therefor?

Objected to as not proper rebutting testimony.

A. I have myself personally examined the files for those years, and I failed to find any advertisement whatever of Mr. John A. Donald or the defendant company, [or of "Rahtjen's composition" manufactured by Holzapfels.]*

[On the margin:] Struck out by order of Judge Lacombe on suggestion of complainant's counsel.

Q. 16. If there had been any such advertisement in said papers, are you certain that you have found it?

Same objection, and as leading.

A. I am certain, as I carefully looked over the files myself.

Q. 17. State whether or not you have been able to find any advertising matter of the defendant, Holzapfel's Compositions Company, Limited, under date of any of the years 1892, 1893, 1894 or 1895, and if so, will you produce the same?

Same objection.

A. I have found two.

269 Q. 18. What are they?

Same objection.

A. As far as I can judge they are monthly statements of vessels' bottoms coated with Holzapfel's compositions.

Q. 19. Of what dates are they?

Same objection.

A. December, 1892, and January, 1893.

Q. 20. Do the words "Rahtjen" or "Rahtjen's composition" appear anywhere upon either of these?

Same objection.

A. They do not.

Complainant's counsel offers in evidence the documents produced by the witness, and the same are received and marked "Complainant's Exhibit S S, 1 and 2 respectively, B. B., ex'r."

Defendant's counsel objects to the offer and receptance in evidence of the said papers on the ground that the same are immaterial and irrelevant and not proper rebutting evidence.

Q. 21. State whether or not there has come into your possession since the taking of complainant's proofs-in-chief any advertising matter of the defendant corporation issued since the commencement of this suit, and if you have, will you produce a sample of the same?

[* Words enclosed in brackets erased in copy.]

Objected to as immaterial and irrelevant and not proper rebutting testimony.

A. Yes, and I here produce it.

Complainant's counsel offers in evidence the circular produced by witness, and the same is received and marked "Complainant's Exhibit T T, B. B., ex'r."

270 Defendant's counsel objects to the offer and receptance in evidence of said paper on the ground that the same is immaterial and irrelevant, and not proper rebutting testimony.

Cross-examination by Mr. McMaster without waiving the objections heretofore taken:

X Q. 22. Can you give the tonnage of the vessels "Rhone," "Star of the East," "Dorian," "Sidonian," "Tyrian" and "Wynnstay"?

A. Well, somewhere near it, I can. The "Dorian," for instance, I suppose she would be 1,100 tons gross register; the "Rhone" I should say about 1,700 or 1,800 tons gross register; "Star of the East," about 800 tons; I should judge the "Wynnstay" was also similar to the "Rhone" in size. "Tyrian" about the same as the "Dorian," and "Sidonian" about 1,600 tons.

X Q. 23. Were not these tonnages good tonnages for vessels in 1889, 1890 and 1891?

A. We always considered them small vessels.

X Q. 24. Prior to becoming agent for the Suter Hartmann & Rahtjen's Composition Company, Limited, were you agent for Suter Hartmann & Company?

A. No, I was not.

X Q. 25. So that your agency for the sale of "Rahtjen's composition" dates from the time, or subsequent to the time, of the formation of the Suter Hartmann & Rahtjen's Composition Company, Limited?

A. Yes.

X Q. 26. Referring now to the printed statements of December, 1892, and January, 1893, of the defendant company, which have been offered in evidence, do you find therein the name of any of the compositions for ships' bottoms manufactured and sold by the defendant company?

271 A. Yes. (Reading:) "For those vessels against the name of which an asterisk (*) is placed, Soapstone composition only was ordered, and for those marked § both Antifouling and Soapstone composition." The same thing is on both statements.

X Q. 27. You do not find the name of the "International" composition made by the Holzapfel's Composition Company, Limited, do you?

A. No, neither "International" nor "Rahtjen's."

X Q. 28. Nor "National" composition manufactured by the defendant company?

A. No.

X Q. 29. Opposite how many ships' and steamers' names, given on the list, do you find the asterisk or § are used?

A. Out of 124 the asterisk is used in two cases, and § appears once, in regard to "Complainant's Exhibit S S No. 2." 5 asterisks appear out of 126, on "Complainant's Exhibit S S, No. 1."

X Q. 30. Do you not consider that these statements represent the total amount of business done by the defendant company during a period, including all the compositions for ships' bottoms made, used or sold by it?

Objected to as incompetent, irrelevant and immaterial, because calling for the opinion of the witness as to matter beyond his knowledge, the exhibit itself being the only means which he has of forming his opinion.

A. I really have no opinion in the matter in regard to that. I have given it very little thought.

X Q. 31. It was not your intention then in producing the statements to complainant's counsel to claim that by reason of the name "Rahtjen's composition Holzapfel's manufacture" not being used in the statements that therefore none of the vessels named on the statements were coated with the defendant Rahtjen's composition?

Same objection.

272 A. My intention in producing these papers was if it would be of any use in assisting our case. I, therefore, showed them to my counsel. I found these papers in looking over other matters, and I thought they might be of use in the case. I supposed they used these for the Rahtjen's composition, and the International composition, and in fact for all the compositions. In fact, I am not able to judge and know nothing about it. No, it wasn't, I might say, in answer to your question.

Redirect examination by Mr. MERWIN:

R. D. Q. 32. Is there anything in these statements "Complainant's Exhibit S S," to suggest to you or cause you to believe that the defendant used a single gallon of its "Rahtjen's composition on a single vessel"?

A. No.

Recross-examination by Mr. MCMASTER:

R. X Q. 33. Nor anything to suggest that the defendant used a single gallon of its International composition, or of its National composition on a single vessel?

A. Yes, there is. By some of the names mentioned here I would know that it was the International used. The North German Lloyd for instance. They were the first users of our composition. I don't think they would be likely to order any Rahtjen's composition from any one else than the Suter Hartmann & Rahtjen's Composition Company, Limited.

R. X Q. 34. You could not tell from merely examining that statement what composition they did use, could you?

Objected to as incompetent, irrelevant and immaterial, as the exhibit speaks for itself.

273 A. No, I could not.

Complainant's counsel offers in evidence certified copy of the original record of the copyright of Complainant's Exhibit R, and the same is received and marked "Complainant's Exhibit U U, B. B., ex's."

Objected to by defendant's counsel as not proper rebutting testimony.

OTTO L. PETERSEN.

274 COMPLAINANT'S EXHIBITS.

EXHIBIT "A."

(1.)

"Rahtjen's patent compositions for coating ships' bottoms.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, *March* 20, 1879.

A. C. Holzapfel.

Mess. Suter, Hartmann & Co., London.

DEAR SIRS: In consideration of your entrusting me further with your agency for Rahtjen's patent composition which you were about to withdraw from me I herewith bind myself, my heirs, executors or administrators under a penalty of one thousand pounds £1,000, not to sell, manufacture or cause to be sold or manufactured or to take any interest whatsoever in any other compositions for the inside or outside of coating of steamers than Rahtjen's & I further bind myself to push the business to the best of my ability as heretofore. The term of the above to hold good for ten years from today's date. It is understood that you bind yourselves to take over from me such raw material as I have at present on hand or contracted for (at cost price), & as you can make use of for the manufacture of Rahtjen's patent composition, also that you immediately withdraw a suit (instituted against me for the manufacture of the German composition) in the high court of justice chancery division, also that you bind yourselves to leave me or my heirs, executors & administrators in possession of your agency under the previous terms for ten years from this date. It is also understood that I am at liberty to
275 sell such German composition as I have manufactured up to this date.

Yours faithfully,

(S'g'd) A. C. HOLZAPFEL.

Witness:

WILLIAM HARTMANN,

Of 18 *Billiter Street, London.*

(2.)

Rahtjen's patent composition for coating ships' bottoms.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, 25 *Nov.*, 1881.

A. C. Holzapfel.

Messrs. Suter, Hartmann & Co., London.

D'R SIRS: Your letter of y'day is to hand but I must decline to pay you anything to cancel the contract you refer to. I understood from Mr. August Hartmann who called upon me today that you are about to appoint another agent here. I also notice he is about renting an office here.

Yours truly,

(S'g'd) A. C. HOLZAPFEL.

EXHIBIT "B."

(1.)

47 RYE HILL, NEWCASTLE-ON-TYNE, 23, 9, '76.

Messrs. Hartmann & Co., Newcastle-on-Tyne.

DEAR SIRS: According to your request I have this day sur-
276 veyed the bottom of the S. S. "Said" of Sunderland in Messrs. Austins' dry dock at Sunderland and found as follows—"viz:"

Two patches of Heyl's anti-fouling composition in the midships of the vessel on both sides covered with small barnacles while the rest of the bottom which was coated with your Rahtjen's composition was perfectly clear.

Yours truly,

(S'g'd) GEO. WM. WARD,
Marine Surveyor.

(2.)

Telegraph address: Farlam, North Shields. Thomas Farlam & Co.

NORTH SHIELDS, 7 *August*, 1877.

Messrs. Hartmann & Co., Newcastle-on-Tyne.

DEAR SIRS: This is to certify that I have carefully examined Rahtjen's composition on the port side of my steamer "Peer of the Realm" and Heyl's composition on the starboard side and finding Rahtjen's the cleanest I ordered the whole of her bottom to be painted with the same, with two coats.

I am, &c., yours very truly,

(S'g'd) THOMAS FARLAM.

277 EXHIBIT "C."

(1.)

Rahtjen's patent compositions for coating ships' bottoms.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, *May* 6, 1879.

A. C. Holzapfel.

Messrs. J. & E. Wilson, London.

DEAR SIRS: If it should be your intention to have your S. S. "Res Tinto" cleaned & painted on the Tyne, I shall be glad to place her in dry dock, scrape her bottom & apply two coats of Rahtjen's compos. from keel to light water mark for £68 (sixty-eight).

Hoping to be favored with your esteemed orders,

Yours faithfully,

(S'g'd) A. C. HOLZAPFEL.

(2.)

Rahtjen's patent compositions for coating ships' bottoms.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, *May 6th*, 1879.

A. C. Holzapfel.

Messrs. Pembroke & Stringer, London.

DEAR SIRS: If it should be your intention to have your S. S. "Marlboro" cleaned & painted on the Tyne, I shall be glad to undertake to place her in dry dock, scrape her bottom & apply two coats of Rahtjen's compos. from keel to light water mark for £90 (ninety).

Hoping to receive your esteemed commands,

Yours faithfully,

(S'g'd) A. C. HOLZAPFEL.

278 EXHIBIT "D."

(1.)

Rahtjen's patent composition for coating ships' bottoms.

Hartmann & Co. and at 52 Mount square, Cardiff.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, *July 1st*, 1877.

GENTLEMEN: It being the general impression amongst ship-owners that our Rahtjen's composition is extravagantly expensive, we beg to submit the following prices regulated by the gross tonnage, according to which *only* we shall in future charge the composition both to ship, dock and slip-owners.

Yours faithfully, HARTMANN & CO.

(List of vessels.)

(2.)

Rahtjen's patent composition for ships' bottoms.

33 QUAYSIDE, NEWCASTLE-ON-TYNE, *February 1st*, 1878.

DEAR SIRS: We beg to call your attention to a list of ships below, coated with Rahtjen's composition during the last two years, and owned on the Tyne, Weat, Tees and Whitby only. A list of all the ships coated with this composition would fill a large book.

279 In giving the number below out of our small sphere we amply show with what success the composition has been introduced here.

Yours faithfully, HARTMANN & CO.

Branches: Hartmann & Holzapfel, 52 Mount Stuart square, Cardiff; Hartmann, Klee & Co., 149 High street, Sunderland.

Ships Coated with Rahtjen's Composition During the Last Two Years.

(List.)

EXHIBIT "E."

Hartmann & Co. and at Cardiff and Sunderland.

33 QUAYSIDE, NEWCASTLE-UPON-TYNE, *July 1st*, 1878.

GENTLEMEN: We beg to inform you that the partnership heretofore existing between us, under the style of Hartmann & Co., has this day been dissolved by mutual consent.

All outstanding accounts due to or from the late firm will be paid and received by Mr. A. C. Holzapfel, who will continue the business as agent for Rahtjen's composition under the style of A. C. Holzapfel, at the above address.

Thanking you for past favors, and hoping that a continuance of them will be granted to the new firm,

We are, gentlemen,

Your obedient servants, JOHN HARTMANN.
A. C. HOLZAPFEL.

280 EXHIBIT "F."

In the High Court of Justice, Chancery Division.

Master of the rolls. 1879, S. No. 147, 17 March, 1879.

Between—

SUTER HARTMANN AND COMPANY, Plaintiffs,
and
ALBERT C. HOLZAPFEL, Defendant.

(Stamp.)

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to Albert C. Holzapfel, of 33 Quayside, Newcastle, in the county of Northumberland:

We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in the chancery division of our high court of justice in an action at the suit of Suter Hartmann & Company.

And take notice, that in default of your doing so, the plaintiff may proceed herein and judgment may be given in your absence.

Witness, Hugh MacCalmont, Earl Cairns, Lord High Chancellor of Great Britain, the seventeenth day of March in the year of our Lord one thousand eight hundred and seventy-nine.

N. B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

A defendant may appear hereto by entering an appearance
281 either personally or by solicitor at the record and writ clerk's office, Chancery lane, in the county of Middlesex.

The plaintiffs claim:

1. An injunction restraining the defendant his agents servants and workmen from selling or offering for sale and from inducing any companies firms persons or person to purchase or use a certain composition for the coating and protection of ships' bottoms called German patent anti-fouling composition or any other composition for the like purpose other than that which the plaintiffs have employed the defendants to sell or procure customers for as their exclusive agent for the Tyne district.

2. Damages for the loss sustained by the plaintiffs by the defendant having sold or offered for sale or induced any companies firms persons or person to purchase or use the said first-named composition or any other composition besides that in respect of which the plaintiffs so employed the defendant as aforesaid.

3. Damages for the loss sustained by the plaintiffs by the defendant in breach of his fiduciary duties having taken out a patent for the said German patent anti-fouling composition.

This writ was issued by Eustace William Owles of 22 Chancery lane in the county of Middlesex, whose address for service is 22 Chancery lane aforesaid solicitor for said plaintiffs who reside at 18 Billiter street in the city of London.

This writ was served by me William Hartmann of 18 Billiter Str. London, on the defendant Albert Carl Holzapfel, on the 20th day of March, 1879.

Indorsed on the 21st day of March, 1879.

WILLIAM HARTMANN,
Of 18 Billiter Street, London.

282 EXHIBIT "G."

To all to whom these presents shall come I William Lowrie of the city and county of Newcastle-upon-Tyne marine superintendent send greeting: Whereas by an order of the Queen's Bench division of the high court of justice made the 16th day of April 1883 in an action of Suter Hartmann & Co. *v.* Holzapfel 1881 S. No. 5396 It was ordered by the court by and with the consent of the parties their counsel and solicitors that the jury find a verdict for the plaintiffs for the amount claimed subject to the award or certificate order arbitrament final end and determination of me the said William Lowrie therein described as Captain Lowrie of Newcastle-upon-Tyne and I was thereby empowered to find what (if any) were the breaches of the agency agreement and to find such general damages on the claim and counter-claim as I saw fit and the said action and counter-claim were thereby referred so as I the said arbitrator should make and publish my award in writing of and concerning the matters thereby referred ready to be delivered to the said parties or either of them or if they or either of them should die before the making of the said award or certificate to their respective personal representatives requiring the same on or before the fourth day of Trinity sittings next ensuing the day of the said order with liberty to the said arbitrator under his hand in writing to enlarge the time for making his said award or certificate.

And whereas I have been attended by and heard the said parties their counsel and witnesses and at the said reference on the thirtieth day of April last the respective counsel agreed in writing that I should decide the following points that is to say.

1. Did the defendant in fact commit any and if so what
283 breaches of agreement. If he did had the plaintiffs previously committed any breach such as to relieve the defendant from further performance of the contract on his part.

2. Did the plaintiffs in fact commit any and if so what breaches of the agreement. If they did had the defendant previously committed any breach such as to relieve the plaintiffs from further performance of the contract on their part.

3. If any breach was committed by either party which was not excused by the conduct of the other party then what damages were occasioned by such breach. And that except on the three points above submitted I might find generally for the plaintiffs or for the

defendant on claim or counter-claim. Now I the said William Lowrie having taken upon myself the burthen of the said reference and having carefully considered the evidence and allegations of the respective parties their counsel and witnesses do make this my award in writing of and concerning the matters so referred to me as aforesaid in manner following that is to say

I award certify and find as follows:

1. The defendant committed a breach of the agreement sued on by not pushing the sale of Rahtjen's composition referred to in the pleadings in the action to the best of his ability. The plaintiffs did not previously commit any breach such as to relieve the defendant from further performance of the contract on his part.

2. The plaintiffs did not commit any breach of the agreement.

3. I assess the damages occasioned by the breach committed by the defendant at the sum of four hundred pounds. Generally I find for the plaintiffs on both claim and counter-claim.

284 In witness whereof I have hereunto set and subscribed my hand this twelfth day of May one thousand eight hundred and eighty-three.

WM. LOWRIE.

Signed by the said William Lowrie in the presence of—

R. W. COOPER,
Sol'r, Newcastle Tyne.

(Endorsement:) 1881. S. No. 5396. In the high court of justice, Queen's Bench division. Suter Hartman & Co. *v.* Holzapfel. Award of Wm. Lowrie, Esqr. Owles & Collinson, 22 Chancery lane, London, W. C.

EXHIBIT "H."

(1.)

(Translation.)

It is hereby certified that the bottoms of His Majesty's ships "Konig Wilhelm" "Kronprinz Arminius" and "Prinz Adalbert" received a coat of Joh. Rahtjen's patent composition paint.

Geestemunde, the 3d February, 1871.

Royal Navy depot.

OBERG,

[L. S.] *Captain of a Corvette in Active Service, Port Commander, Chief of the Navy Depot ad Interim.*

To Mr. Joh. Rahtjens, Bremerhaven.

No. 295.

285 (2.)

(Translation.)

Certificate.

The undersigned has much pleasure in granting to Mr. Joh. Rathjens of Bremerhaven, inventor and manufacturer of Rahtjen's composition paint, a certificate that the article called "composition" has been used for more than 6 years for painting the bottoms and the insides of all steamers of the North German Lloyd and that it has fully answered all requirements.

Bremerhaven, the 20th January, 1871.

Agency of the North German Lloyd.

GEORGE PAPPE,
Capt'n, Inspector.

(3.)

We hereby certify that Rahtjen's patent composition has been used about 8 years on the bottoms of the entire fleet of steamers of the North German Lloyd.

It has given us entire satisfaction and we have not found anything to surpass it.

Bremerhaven 21 July 1873.

(S'g'd) G. PAPPE, *Inspector.*

(4.)

(Translation.)

The undersigned has much pleasure in attesting that Rahtjen's composition paint has been used with much success since
286 1865 and is still so used at the present time for painting the bottoms of the steamers of the North German Lloyd.

Bremerhaven, the 3d March, 1875.

Repairing works of the North German Lloyd.

GEORGE PAPPE, *Inspector.*

(5.)

We hereby certify that Rahtjen's patent composition has been used with success since 1865 almost exclusively on the bottoms of the entire fleet of the North German Lloyd steamers. We have tried on five or six ships other paints & however similar they were in appearance to Rahtjen's when first applied, the result was such that we have used none again of late but Rahtjen's.

Bremerhaven, Nov. 25, 1876.

(S'g'd) G. PAPPE.

EXHIBIT "J."

(1.)

Royal Mail Steam Packet Company.

N. 2290. No. 55 MOORGATE STREET,
LONDON, E. C., 25*th August*, 1871.

Messrs. Suter Hartmann & Co., 50 Basinghall street.

GENTLEMEN: With reference to the correspondence which has taken place on the subject of Rahtjen's composition I am desired to state that there will be no objection to trying a patch upon the bottom of one of this company's ships, upon the understanding
287 that it is done at your own expense. Please ascertain from Capt. Jellicine (x) when it will be convenient for the trial to be made.

Your ob'd serv., N. A. LLOYD, *Sec'y.*

(*Our superintendent at Southampton.)

(2.)

Royal Mail Steam Packet Company.

No. 682. No. 55 MOORGATE STREET,
LONDON, E. C., 6 *May*, 1872.

Messrs. Suter, Hartmann & Co., Baskinghall street.

GENTLEMEN: We shall be glad to see you again on the subject of your proposition to coat the Elbe with Rahtjen's composition. Will you please therefore call here either tomorrow or Thursday on the subject. About 11 to noon will suit.

Your obed. servant, MURLIS J. DYER, *Per Sec'y.*

(3.)

Peninsular & Oriental Steam Navigation Company, marine department. Offices, Oriental place.

SOUTHAMPTON, 29*th Sept.*, 1871.

Messrs. Suter, Hartmann & Co., 56 Basinghall street, London.

Rahtjen's composition.

GENTLEMEN: In reply to your letters of yesterday's date, I beg to say that the compositions of Mr. Rahtjen had better be sent at once.

288 The "Simla" will go into dry dock next week and I will telegraph to you the day when you can send a person to superintend the putting on of the composition should an opportunity then be afforded of making a trial of it.

I am, gentlemen,

Your obedient servant, W. S. CACH,
Superintendent.

P. S.—The "Simla" will make the Mediterranean voyage—*i. e.*, Alexandria and back and you will please send either the No. 2 or No. 3.

(4.)

Peninsular & Oriental Steam Navigation Company, marine department. Offices, Oriental place.

SOUTHAMPTON, *3rd October*, 1871.

Messrs. Suter, Hartmann & Co., 56 Basinghall St., London, E. C.

GENTLEMEN: I have advised you by telegram that "Simla" goes into dock today, will be ready for painting tomorrow (Wednesday); please send some one to superintend, and I have now further to inform you that the Rahtjen's composition has arrived.

I am, gentlemen,

Yours faithfully, WM. CAMPBELL,
For the Superintendent.

289 EXHIBIT "K."

(1.)

Store department, Royal Mail Steam Packet Company.

No. 17091.

55 MOORGATE ST., LONDON, *5th July*, 1872.

Messrs. Suter Hartmann & Co.:

Please supply to St. Thomas, care of W. P. D. Richardson, Southampton, a supply of Rahtjen's composition sufficient to coat one steamer of 1,563 tons, to be forwarded per departure of 17th July next, addressed to S. B. Cameron, Esqr., superintendent Royal Mail Steam Packet Co., St. Thomas.

	Feet.
Length	296
Breadth	32
Depth	14

J. MACKINTOSH,
Per B. M.

(2.)

Store department, Royal Mail Steam Packet Company.

No. 7509.

55 MOORGATE ST., LONDON, *23rd September*, 1872.

Messrs. Suter Hartmann & Co.:

Please supply to S. S. "Liffey," care of Cap'n T. A. Bevis, Southampton, a sufficient supply of No. 1 & 3 Rahtjen's composition to coat the "Liffey," to be forwarded without fail today.

J. MACKINTOSH,
Per B. M.

290 (1.)

EXHIBIT "L."

5 OCTOBER, '71.

Messrs. The P. & O. Steam Navigation Comp'y, Southampton:

As below Rahtjen's patent composition on "Simla" S. H. & Co.

55	1 cask	Z. lbs. 97	Eng. lbs. 108–1/2	No. 1			
16 & 26	2	— — — 97	— — 107–1/2				
			Eng. lbs. 216				
			cwt. 1.3.20	92/6		8	18 5
56/60	5 casks	Z lbs. 200	Eng. lbs. 224	No. 111.			
			cwt. 2.–.–		155/–	15	10 –
						24	8 5
			12–1/2 % off			3	1 1
						21	7 4

E. & O. E.

The above stands void if the paints does not turn out satisfactory.

S. H. & CO.

291 (2.)

Messrs. The Royal Mail Steam Packet Comp'y, Moorgate Str.:

As below per Chaplin & Horne, addr. to J. P. Cameron, Esq., St. Thomas, c. o. R. D. Richardson, Esq., Southampton.

Rahtjen's patent composition.

S. H. & Co.	cwt.	qr.	lb.				
192/3	1	–.	–.	No. 1	88/–	4	8 —
194/7	2	–.	–.	No. 11	117/6	11	15 —
198/201	2	–.	–.	No. 111	147/6	14	15 —
						30	19 —
				12–1/2 off		3	17 3
						27	— 9
				10 casks		—	15 —
						27	15 9

(3.)

9 FEB'RY, '72.

Messrs. Oswald & Co., Sunderland:
Net 30 days.

John Rahtjen's patent composition.

S. H. & Co.						
231	1 cask composition	No. 1.	4.—.—.	92/6		18 10 —
S. H. & Co.						
235/6	3 cask —	No. II.	3. 1.23	117/6		20 6 —
						38 16 —
	1 cask 6/–	£—. 6.—.				
	3 — 4/–	—. 12.—.				
		—. 18.— half				— 9 —
						39 5 —
		12-1/2 % dis. on £38.16.—.				4 17 —
						34 8 —

292 (4.)

Amended Invoice.

10TH FEB'RY, '72.

Messrs. The Royal Mail Steam Packet Comp'y, Southampton:
30 days net cash.

Rahtjen's patent composition pr. "Belize."

S. H. & Co.	300	0.3.22	4.3.22	1	88/–	21 15 3
	301	4.–.–.				
	272	1.2.–.				
	273	1.2.–.				
	No nos.	1.2.–.	6.2.0.	No. III	147/6	47 18 9
	81	–.2.–.				
	210	–.2.–.				
	305	1.–.–.	6 casks 2/ 1/6 3/ 2/6 1 1/6			
			half amount			— 8 3
						70 2 9
			12-1/2 % on £69.14.—.			8 14 3
						61 8 —

305 1 cask sent out pr. "Belize."

293 EXHIBIT "M."

N. S. 4882
7856.

It is requested that in any further communication on this subject the above letters and number may be quoted, and the letter addressed as follows:

"The secretary of the admiralty," "Whitehall," "London" "naval store branch."

ADMIRALTY, S. W., *18th November*, 1873.

GENTLEMEN: With reference to your letter of the 23rd October last requesting that the lords commissioners of the admiralty would exercise their influence to enable you to continue importing Rathjen's composition free of duty, I am to inform you that my lords regret that they cannot interfere in this matter.

I am, gentlemen,
Your obedient servant, ALBERT HALL.

Messrs. Suter Hartmann & Co., 56 Basing Hall street, E. C.

EXHIBIT "N."

LIVERPOOL, *Jan'y 24th*, 1876.

We have coated all our steamers with Rahtjen's patent compositions for the past three or four years, during which time it has given us complete satisfaction, and we are continuing to use same.

STRONG, REID & PAGE.

To Messrs. Suter, Hartmann & Co., Liverpool.

294 EXHIBITS "P" AND "A A."

(*Statement of Sales by Suter Hartmann & Co. and Suter-Hartmann & Rathjen's Composition Co., Lim., of "Rathjen's Compositions" in the United States from* 1879 *to* 1891, *Inclusive.*)

"P."

	Cwt. No. I.	Cwt. No. II.	Cwt. No. III.	Year.	Yearly totals. Cwt. No. I.	Cwt. No. II	Cwt. No. III.
1879.							
July 30	20	—	20				
Dec. 23	30	—	—				
	—	—	—	1879	50		20
1880.							
June 16	20		20				
29	20		20				
Nov. 23	20		20				
	—		—	1880	60		60

	Cwt. No. I.	Cwt. No. II.	Cwt. No. III.	Year.	Yearly totals. Cwt. No. I.	Cwt. No. II.	Cwt. No. III.
1881.							
M'ch 10	20		20				
Ap'l 12	20		20				
July 8	15		15				
July 11	45		45				
Aug. 27	20		20				
Oct. 5	40		20				
	—		—	1881	160		140
1882.							
Jan. 11	20		20				
Feb. 2	10		10				
M'ch 4	20		20				
May 23	20		20				
June 20	20		20				
Aug. 29	20		20				
Sept. 11	40		20				
Nov. 17	20		20				
	—		—	1882	170		150
295							
1883.							
Ap'l 3	20		20				
24	20		20				
25	20		20				
May 19	40		40				
June 4	40		40				
July 9	1		1				
Oct. 2	20		20				
Nov. 22	40						
Dec. 31	40		20				
	—		—	1883	241		181
1884.							
Jan. 12	20		20				
M'ch 26	40		20				
28	30		30				
May 3	20		20				
26	20		20				
July 7	40		40				
Aug. 11	40		20				
Sept. 30	30		30				
Oct. 31	60		40				
"	40		40				
Dec. 23	—		—				
	—		—	1884	340		280

Summary.

	No. I.	No. III.		Totals
(1/2 yr.) 1879	50	20	1879 (1/2 yr.)	70
Year 1880	60	60	1880 (1 yr.)	120
1	160	140	1881 "	300
2	170	150	2 "	320
3	241	181	3 "	422
4	340	280	4 "	620
	1,021	831		1,852

296 "A A."

Date.	No. I. Cwts.	No. III. Cwts.	Date.	No. I. Cwts.	No. III. Cwts.
1885.			1887.		
Jan. 28	20	20	Jan. 24	30	20
Feb. 6	20	10	28	—	20
M'ch 19	30	30	M'ch 14	40	—
" 21	20	20	Ap'l 13	20	20
Ap'l 13	2	2	Ap'l 23	—	20
22	20	20	May 6	30	30
May 18	50	50	July 13	20	20
June 10	40	—	Aug. 6	20	20
July 20	30	40	31	30	30
Aug. 5	10	10	Oct. 27	20	—
" 31	60	40	" "	40	20
	302	242		250	200
1886.			1888.		
Jan. 8	40	20	Jan. 6	20	20
Feb. 2	40	20	16	20	20
M'ch 18	20	20	Feb. 4	20	—
Ap'l 6	20	20	May 9	40	20
27	20	20	17	40	—
June 3	20	20	June 15	—	40
June 1	40	—	Sep. 13	20	20
" 17	20	20	Oct. 16	20	20
July 27	20	20	Nov. 29	20	20
Oct. 1	30	30			
" "	20	20			
Dec. 29	20	30			
	310	240		200	160
1889.			1890.		
Jan. 31	40	20	Jan. 14	20	20
Feb. 8	15	10	Feb. 14	80	60
" 15	20	40	M'ch 17	30	20
27	15	10	Ap'l 18	20	10
M'ch 29	15	12	May 9	20	10

Date.		No. I. Cwt.	No. III. Cwts.
Ap'l	5	20	10
Ap'l	15	20	15
Ap'l	23	20	20
May	17	40	40
May	21	20	15
	28	10	10
June	11	40	40
June	18	30	20
July	19	6	15
July	26	40	40
		297	
1889.		Forward 351	317
Aug.	3	—	12
Sept.	10	60	60
Oct.	4	15	—
"	"	40	40
"	"	30	30
"	8	15	15
Nov.	1	40	40
	19	15	15
	26	40	40
		506	569

Date.		No. I. Cwt.	No. III. Cwts.
	20	15	15
	30	20	10
June	6	40	40
"	"	7	13
	27	40	40
July	18	25	15
"	29	12	8
Aug.	1	10	15
Aug.	6	10	20
	11	40	40
1890.		For'd 389	336
Sept.	30	40	49
Oct.	3	30	12
	17	40	40
	24	40	40
		539	468
1891.			
Jan.	9	—	15
	9	40	40
	23	25	25
Feb.	10	40	40
M'ch	6	20	25
	6	8	7½
	31	40	40
	11	20	20
Ap'l	3	25	25
	17	25	20
May	12	40	50
	27	6½	6
June	2	40	40
	19	40	40
Aug.	8	30	50
	17	15	15
	20	10	20
	27	40	40
Sept.	7	40	40
		504½	558½

Summary.

Year.	No. I. Cwt.	No. III. Cwt.	Total cwt. Nos. I & III.
1885	302	242	544
6	310	240	550
7	250	200	450
8	200	160	360
9	606	569	1,175
90	539	468	1,007
1	504 1/2	558 1/2	1,063
	2,711 1/2	2,437 1/2	5,149

298 The invoices were from—

Jan'y 1885 to June 1886 to Hartmann, Le Doux & Maecker.

July 1886 to Dec. 1888 to Emil Maecker.

Jan'y 1889 to Sept. 1891 to Otto L. Petersen, E. W. Travers, Williams Dimond & Co., Gustavus & Co., Menze & Son and James Loveland.

EXHIBIT "Q."

(Translation.)

BREMERHAVEN, *November* —, 1869.

Mr. Henry Gelien, Hoboken:

Referring to my letter of the 1st October of the present year I revert by these presents to the contents of your favour of the 9th September of the present year.

It appears from enquiries made that it will be very difficult in the United States to obtain a patent for my paint, one of the reasons for this being that my paint contains some ingredients which are already known as components of paints and the Patent Office will probably object to this and reject the application for the patent. But in my opinion it is better to forego the patent rather than to apply for a patent and receive a refusal.

With a view however, to introducing my paint there, notwithstanding, we can try this without taking out patent there being no immediate danger of any exact imitation of the invention (several competitors here and elsewhere have attempted to bring on the market an article similar to mine but all consumers have rejected it for want of durability).

As you are perhaps already aware my composition paint exists in two qualities No. I being used as a first coat on bottoms and on all articles of iron; it protects chiefly against rust and is in every case to be used like Mennie.

299 The paint No. 2 is only used as last coat of the bottoms; it protects mainly against incrustation and accumulation. In order to introduce my composition paint there I quote you the following terms:

(1). The paint shall be brought on the market under the name of "Rahtjen's composition."

(2.) You shall have the exclusive sale there on condition that you shall not attempt to sell a similar, imitated paint of my competitors, at the same time.

(3.) I quote you the price for No. I gold P. at 20.— for No. II gold P. at 28.—per cwt. of 100 pounds German weight, if delivered in barrels including cooperage, if delivered in tins the cooperage is charged at cost price, the price is f. o. b., three months' credit.

I beg you to give me your opinion hereon and expect to hear from you at your earliest convenience.

Believe me, yours obediently,

JOHN RAHTJEN.
H. RAHTJEN.

EXHIBIT "S."

Rahtjen's composition paints, known as the German paint.

(Picture of a ship.)

Office of Henry Gelien, sole agent for the United States.

155 MAIDEN LANE, NEW YORK, *January 27th*, 1877.

300 EXHIBIT "T."

Office, 122 Front street.

NEW YORK, *April 23rd*, 1878.

Having been appointed sole consignees in the United States of Rahtjen's patent composition for coating ship bottoms, by Mr. Rahtjen of Bremerhaven, the inventor and manufacturer, we have the honor to inform you that we have this day established ourselves under the firm of Hartmann, Le Doux & Maecker.

Requesting your kind attention to the signatures at foot, we are, dear sir,

Yours respectfully,

HARTMANN, LE DOUX & MAECKER.

Mr. William Hartmann will sign:
(Autograph) HARTMANN, LE DOUX & MAECKER.
Mr. Richard Le Doux will sign:
(Autograph) HARTMANN, LE DOUX & MAECKER.
Mr. Emil Maecker will sign:
(Autograph) HARTMANN, LE DOUX & MAECKER.

301 EXHIBIT "U."

Rahtjen's composition paints, known as the German paint.

(Picture of vessel.)

Office of Henry Gelien, sole agent for the United States.

155 MAIDEN LANE, NEW YORK, *July 14th*, 1874.

Messrs. Suter Hartmann & Co., Liverpool.

GENTLEMEN: As it is for our mutual interest to have the Rahtjen's comp. paint established as the best and only paint for the preservation of iron bottoms, you would confer a great favor to me by writing to the different steam S. Co. and asking their opinion in regard to the Rahtj. C. P. and principally those who had formerly been using the McGinnis paint. This paint has been lately introduced in this market and highly recommended, although condemned in England for the last two years as injurious to the iron.

If you could send me certificates of some of your comp. in which they express themselves unsatisfactory about the McGinnis and in favor of the Rahtj. C. paint, I would have them printed in a circular and distributed among our owners of iron ships and it will be easy work for me to turn the McGinnis paint out of the market, without waiting for the results of said paint.

You would oblige me very much by sending some certificates as soon as possible, and thanking you for your trouble, I remain,

Yours respectfully,

(S'g'd) HENRY GELIEN.

302 (2.)

Rahtjen's composition paints, known as the German paint.

(Picture of vessel.)

Office of Henry Gelien, sole agent for the United States.

155 MAIDEN LANE, NEW YORK, *Feb. 27th*, 1875.

Messrs. Suter Hartmann & Co., No. 12 Rumford place, Liverpool, Eng.

GENTLEMEN: I just received from Mr. John Rahtjens one of your new circulars and it being of great importance to me that ship-owners here should know what is done with the Rahtjen's patent composition in England, you would greatly oblige by sending me either by mail or express as you think best fifty such copies with sample of paint attached, at the same time asking Mr. Rahtjen to charge cost of same to my account and let him pay for them.

In conversation with the chief mate of the S. S. Idaho of the William & Guion line I ascertained that Mr. Williams is favoring the Rahtjen's composition paint, while Mr. Guion here a director of the Pacific Mail S. S. Co., is highly recommending the McInnis

paint, therefore it would be of great service and importance to me if I had some kind of certificate from Mr. Williams or the supt. of the line in Liverpool to contradict Mr. Guion here that they are only using the Rahtjen's patent composition on their bottoms; by which proof I may be able to get the bottoms of the Pacific Mail S. S.

As it may be of some service to you I send by today's mail fifty copies of a special survey of the Rahtjen's patent composition held by the underwriters on the botton of the S. S. Wyanoke of the Old Dominion S. S. Co.

I remain, respectfully yours,

(S'g'd) HENRY GELIEN.

303 EXHIBIT "V."

Rahtjen's patent composition, No. II, for ships' bottoms, buoys, &c.

Directions.

This paint, which should be applied with clean brushes, is used over the priming No. 1. It is specially necessary that it should be thoroughly stirred, so that no sediment is formed in the casks or kettles. The painters might keep a small stick in the pots and stir it well.

In case the composition getting a little too thick, strong methylated spirit can be used as thinnings.

No other substance to be mixed with the paint under any circumstances whatever.

None genuine without this signature.

(Fac-simile.)

SUTER HARTMANN & CO.

London: 18 Billiter street.
Liverpool: 12 Rumford place.
Glasgow: 12 York street.

EXHIBIT "W."

John Rahtjen's patent compositions, for painting the bottom of iron and wooden ships and buoys, to prevent rust, barnacles, &c.

304 GENTLEMEN: We hereby have the honor to inform you, that we have been appointed sole agents in the United Kingdom for the sale of the above-named patent compositions.

These compositions have superior claims to the attention of shipping companies and owners, owing to their being equally applicable to wooden as to iron vessels.

Sufficient proof of their great serviceableness to warrant our confidential-y asking for a trial, is the fact that they have been adopted by the Prussian government for their entire fleet, after careful, and prolonged experiments with all other known preservative and anti-fouling compositions. The North German Lloyd, also, has been using for the last six years these compositions for their steamers.

This paint is extremely remarkable for drying rapidly, as a large

vessel can receive the complement of two coats in a few hours, thus economizing time and expense in dry-docking.

On the 5th of August, 1870, His Majesty the King of Prussia's ironclad, "Arminius," was in dry dock at Bremerhafen, and underwent within five hours the entire process. One hour after the completion of the painting *of* the vessel steamed out to sea.

The royal dock yard received orders from the marine administration at Berlin, to have the bottoms of the entire fleet coated with the Rahtjen's patent compositions. Most of the vessels were in consequence of this docked at Wilhemshafen.

A thin even coating being only required, the quantity used is comparatively small, and annexed prices bear a very favorable comparison with those of all other preparations in the market.

If desirable, any other cheap paint may be used as first coating, and our composition No. 2 (or No. 3 if for East India or hot climates) applied over it.

Any further information you may wish we shall be most
305 happy to supply, and while requesting your attention to the prices and instructions annexed.

We remain, gentlemen,
Yours respectfully, SUTER, HARTMANN & CO.

London, 56 Basinghall street, and at Liverpool, 12 Rumford place. January, 1871.

Prices.

Composition No. 1 (against rust).....		Free on board.
" " 2 (against barnacles and fouling per cwt.).....		Import.
" " 3 (against barnacles and fouling per cwt.).....		Ship River Thames.

John Rahtjen's patent composition No. 1 for painting iron ships, buoys, and anything iron liable to rust.

Directions.

After the part to be painted is cleared from rust and loose paint, thoroughly stir the composition and apply a thin even coating, take care to use good clean brushes. If the part is already covered with good paint one coating is sufficient, but new or scraped iron requires two coatings. As these compositions possess great drying powers, it is advisable to paint a single plank or place lengthways on the ship at a time, for if painted downwards each recommencement at the top would be apt to show.

306 To prevent these paints from spoiling, it is only necessary to be careful not to mix them with any other substance.

For inside iron-work.—All parts painted twice with composition No. 1 are thoroughly protected for a considerable time against the ever-destroying rust.

John Rahtjen's patent compositions Nos. 2 & 3 for painting the bottoms of iron and wooden ships and buoys.

Directions.

Either of these paints are to be used as a second coating over No. 1, to prevent rust, barnacles, mussels, etc., becoming attached to the ship. Composition No. 1 is thoroughly dry in about two hours. It is especially necessary that these compositions should be stirred till thoroughly mixed before using, and also that they be put on with clean brushes. No. 3 is only applied for East India and warm climates.

No other substance must be mixed with these paints under any circumstances whatever.

London, January, 1871.

56 Basinghall street, and at Liverpool, 12 Rumford place.

None genuine without this signature on each label,

(Autograph signature) SUTER, HARTMANN & CO.

307 EXHIBIT "C C."

127 PEARL STREET, NEW YORK, 1*st July*, 1886.

Referring to the enclosed circular, I beg to inform the patrons of my late firm, Hartmann, le Doux & Maecker, that I have made arrangements with Mr. D. Clark, of 256 South St., city, for the retail trade of Rahtjen's composition, and request them to apply to him in regard to contracts for scraping and painting, in the docks of this city and vicinity.

Mr. Clark who is well known in the ship-painting trade, will give your valued orders that prompt and careful attention which my late firm always bestowed upon them.

Respectfully yours, EMIL MAECKER.

(2.)

Hartmann, Le Doux & Maecker, New York.

134 PEARL STREET, NEW YORK, 1*st July*, 1886.

We have the honor to inform you, that the partnership hitherto existing between us, has been dissolved by effluxion of time and by mutual consent.

Mr. Emil Maecker, will carry on the business at 127 Pearl St., N. Y., and 127 Scholes St., Brooklyn, E. D., on his own account, and will represent Messrs. Suter, Hartmann & Co., of London, as agents for America for the sale of Rahtjen's anti-fouling composition.

Yours respectfully, WILLIAM HARTMANN.
RICHARDS LE DOUX.
EMIL MAECKER.

308 EXHIBIT "D D."

(Translation.)

8TH FEBRUARY, 1872.

Mr John Rahtjen, Bremerhaven:

We had the pleasure of receiving your esteemed letter of the 5th instant and we confirm our respects of the 6th instant.

The chief purpose of the present is to request, that you will in any case send us by the next steamer 5 cwt. compos. No. III.

Meantime, we remain, with kind regards,

Yours faithfully,

(S'g'd) SUTER, HARTMANN & CO.

Mr. Hinr. Hartmann, Sen'r, on his return journey thither took some circulars and direction papers which he will let you have if possible on Saturday.

EXHIBIT "E E."

(Extract of language of grant from indenture, Hartmann Bros. to Suter, Hartmann & Company, & Suter, Hartmann & Rahtjen's Composition Co., Ltd., dated August 16, 1888.)

"Hereby respectively assign, transfer and convey to the said Suter, Hartmann and Rahtjen's Composition Company, Limited, all and singular the trade-marks used or employed by the said Georg Heinrich Johannes Hartmann and Friederich Carl August Hartmann for the purpose of their said business and particularly the said trade-mark No. 32194 and all trade-marks registered by them in all parts of the world and also the trade-mark used and employed by the said William Hartmann, Georg Heinrich, Johannes Hart-
309 mann, Friedrich Carl, August Hartmann, and James Suter in or for the purposes of their said business and registered in England under No. 34919, and also all the good wills of and in the said two businesses respectively to hold the said trade-marks and premises hereinbefore expressed to be hereby assured unto the said Suter, Hartmann & Rahtjen's Composition Company, Limited, their successors and assigns absolutely."

EXHIBIT "F F."

(Extract of language of grant from indenture, Hartmann, Le Deux & Co., vendors, to Suter, Hartmann & Rahtjen's Com. Co., Ltd., dated August 28, 1888.)

"Assign to the company as from the thirtieth day of June one thousand eight hundred and eighty-eight, all and singular the business and the good will of the business of general merchants and commission agents as now carried on by the vendors in partnership under the style and firm of Hartmann le Doux & Co., *at* 12 Rum-

ford place, Liverpool, in the county of Lancaster aforesaid, and the benefit and advantage thereof and of all contracts and engagements, trade-marks, trade names, rights and privileges to which the vendors were on the said thirtieth day of June, one thousand eight hundred and eighty-eight entitled in relation to the said business of Hartmann le Doux & Co., and all the future profits thereof."

310 EXHIBIT "G G."

(Extract of language of grant from indenture, Hartmann Bros. to Suter, Hartmann & Rahtjen's Composition Co. (the company), vendors, dated August 28, 1888.)

"Assign to the company as from the thirtieth day of June, one thousand eight hundred and eighty-eight, all and singular the business and the good will of the business of merchants and manufacturers as now carried on by the vendors in partnership under the style or firm of 'Hartmann Brothers' at Canning Town in the parish of Ham, in the county of Essex aforesaid, and the benefit and advantage thereof and of all contracts and engagements, trade-marks, trade names, rights and privileges to which the vendors were on the said thirtieth day of June, one thousand eight hundred and eighty-eight, entitled in relation to the said business of 'Hartmann Brothers' and all the future profits thereof."

EXHIBIT "H H."

Extract of language of grant from indenture of John Rahtjen, of the first part, G. F. Heyl, of the second part, and Suter, Hartmann & Co., of the third part, vendors, to Suter, Hartmann & Rahtjen's Composition ("the company," dated August 28, 1888), by which the vendors—

"Assign to the said company as from the thirtieth day of June, one thousand eight hundred and eighty-eight, all and singular the business and the good will of the business of merchants and manufacturers as now carried on by the vendors in partnership under the style or firm of Suter, Hartmann & Co., at No. 18 Billiter street, in the city of London aforesaid, and the benefit and advantage
311 thereof and of all contracts and engagements, trade-marks, trade names, rights and privileges to which the vendors were on the said thirtieth day of June, one thousand eight hundred and eighty-eight, entitled in relation to the said business of 'Suter, Hartmann & Co.' and all the future profits thereof, and the right as enjoyed by the vendors on that day to manufacture and sell the said paints and compositions known as 'Rahtjen's anti-fouling and preservative compositions' for ships' bottoms and other submerged structures and the full benefit of all rights of the vendors under the said scheduled agreements for manufacture and sale and all the rights, property and interest of the vendors of and in the trade-marks mentioned in the said scheduled agreements for manufacture and sale or any of them." * * *

"All and singular the sums of money which would but for the hereinbefore recited agreements and the present assignment become payable from and after the thirtieth day of June, one thousand eight hundred and eighty-eight, and henceforth to the several persons parties hereto of the first and second parts or any or either of them for or in respect of royalties or otherwise under the said scheduled agreements for sale and manufacture or any of them, and all and singular other the rights and interests whatsoever of the said several persons parties hereto of the first and second parts respectively or any or either of them from and after the said thirtieth day of June, one thousand eight hundred and eighty-eight in or under the said scheduled agreements for manufacture and sale or any of them; and all and singular the rights, property and interests of the said several parties hereto of the first and second parts respectively any or either of them in and to all and singular the trade-marks mentioned in the said agreements for manufacture and sale or any of them as from the said thirtieth day of June, one thousand
312 eight hundred and eighty-eight; and all and singular the rights of them the said parties hereto of the first and second parts to deal in the said paints and ships' compositions and the full benefit of the right to deal in all improvements therein now known or hereafter to be discovered by the several persons parties hereto of the first and second parts respecti-ely or any or either of them in all or any of the countries or places mentioned in the said second schedule hereunder written as fully and freely as the said several persons parties hereto of the first and second part- respectively or any or either of them, but for this present assignment might have done, together with full power to the company in the names or name of the said several persons parties hereto of the first and second parts or any or either of them or their or his firm or firms or executors or administrators or otherwise to sue for demand recover, enforce and receive payment of and to give effectual receipts and discharges for all sums of money, royalties, damages, costs, charges and expenses which may become recoverable or payable under or by virtue of the assignments hereinbefore contained. To have, hold, receive, take and enjoy all and singular the sums of money, rights, property and interest hereinbefore expressed to be hereby assigned unto and by the company, its successors and assigns absolutely; and for the consideration aforesaid the several persons parties hereto of the first and second parts respectively do and each of them doth hereby covenant with the company that the covenanting parties and each of them will communicate to the company or to such officer or officers for the time being of the company as the company may from time to time appoint for this purpose every improvement either now discovered or known or hereafter to be discovered or known by the covenanting parties or any one or more of them in or in connection with the said paints and compositions known as 'Rahtjen's
313 anti-fouling and preservative compositions for ships' bottoms and other submerged structures,' to the intent that the company may have the exclusive benefit of making, dealing in and selling the same improved paints or compositions in all or any of

the countries or places specified in the said second schedule hereunder written."

EXHIBIT "J J."

(Translation.)

BREMERHAVEN, 15*th Jan'y*, 1878.

I hereby confirm that I have given to Messrs. Suter, Hartmann & Co. in London the exclusive right of sale of my patent composition paints for the United States of North America for the period of 12 (12) years from the commencement of 1878 to the end of 1889.

The paint to be supplied for America is to be obtained from the business here at the prices of

50 shillings for patent composition paint No. 1.
72 " " " " " " 2
85 " " " " " " 3

per 100 pounds custom weight with 2½ % discount against 2 months' drafts.

Should a change in the price of raw materials occur, a change in the above prices is also permissoble.

JOH. RAHTJEN.

The credit is fixed at three months.
London, 20th February, 1878.
JOH. RAHTJEN.

314 EXHIBIT "K K."

—1—

Rahtjen's anti-fouling composition.
—Priming—
Remove head & stir well before using.
S H & Co.
111
Trieste

———

—2—

Rahtjen's anti-fouling composition.
111.
Remove head & stir well before using.
S H & Co.
150
Trieste.
111
Stir well before using.

—3—

Genuine
Rahtjen's composition.
Trade (hand) mark.
Hartmann's
Manufacture
No. 1
Priming.
S. H. Co.
18079
Singapore.
Stir well before using.
No. 1.

4

Genuine
Rahtjen's composition.
Trade (hand) mark
Hartmann's
Manufacture
315 No. 111
Anti-fouling.
S. H. & Cos.
18080
Singapore.
Stir well before using.
No. 111.

5

Genuine
Rahtjen's composition.
Trade (hand) mark
Hartmann's
Manufacture
Priming
Stir well before using.
S. H. & Co.
23456
Liverpool.

6

Genuine
Rahtjen's composition.
Trade (hand) mark.
Hartmann's
Manufacture
No. 111
Stir well before using.
S. H. & Cos.
23457
Liverpool.

7

Genuine
Rahtjen's composition.
Trade (hand) mark.
Hartmann's
Manufacture
No. 111
Stir well before using.

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316 8

S. H. & Cos.
32392
Liverpool.

9

Genuine
Rahtjen's composition.
Trade (hand) mark
Hartmann's
Manufacture
Priming
Stir well before using.

10

S. H. & Co.
1234
Liverpool.

EXHIBIT "L L."

(1.)

Fol. 37 45.

Kemble building, 15 & 25 Whitehall St.

ROOM 124, NEW YORK, *October 19th*, 1887.

Mr. D. Clark, 256 South St., city, bought of E. Maecker.

Terms—Cash.

S. H. & Co. Rahtjen's composition.
No. 69219 1 drum anti-fouling R. at 10½ at 4.50..... $47.25
Less 25 %..... 11.81
$35.44

Net.

1/11 87, paym't rec'd.

E. MAECKER.

317

(2.)

Kemble building, 15 & 25 Whitehall St.

ROOM 124, NEW YORK, *December 26th*, 1888.

Mr. David Clark, 256 South St., city, bought of E. Maecker.

Terms—Cash.

7874 }
7873 } 2 drums priming at 10½ glls., 21 glls. at $3.50 ..... $73.50
6584 } 1 " anti-fouling at 10½ glls., " 4.50 ..... 47.25
120.75
Less 25 %..... 30.19
$90.56

1/26 89, payment rec'd.

E. MAECKER,
P'r W. BERISON.

EXHIBIT "M M."

NEW YORK, ——, 189–.

Dr. to David Clark, house, ship, yacht, and steamboat painting, No. 256 South street.

Sole agent for New York for Rahtjen's composition for vessels' bottoms.

Estimates cheerfully furnished.
Telephone call, Courtlandt, 477.

26—267

318 EXHIBIT "N N."

Liber T 33, page 30.

For and in consideration of one dollar to us in hand paid the receipt of which is hereby acknowledged, we the firm of Hartmann, Le Doux & Maecker domiciled and doing business in the city county and State of New York, do hereby sell assign and transfer unto the firm of Hartmann Bros. of London England, all our right title and interest in and to a certain trade-mark for prepared paint deposited by us in the United States Patent Office and recorded therein the 23rd day of June, 1885.

No. 12336.

Witness our hand and seal this twenty-eighth day of July, 1885.

Recorded July 29, 1885.

HARTMANN LE DOUX & MAECKER.

In presence of—
T. WIGGERS, JR.

EXHIBIT "O O."

Liber T 39, page 14.

For and in consideration of one dollar to us in hand paid the receipt of which is hereby acknowledged we the firm of Hartmann Brothers domiciled and doing business in London England do hereby sell assign and transfer unto the Suter Hartmann and Rahtjen's Composition Company Limited of 18 Billiter street London England manufacturers and merchants a company with limited liability domiciled in Great Britain all our right, title and interest in and to a certain trade-mark for prepared paint now standing in our name in the United States Patent Office and recorded therein on the 23rd June 1885. No. 12336.

319 Witness our hands and seals this tenth day of October, 1888.

HARTMANN BROS.,
By FRIEDRICH CARL AUGUST HARTMANN,
A Partner in the Firm.

In presence of—
T. J. BAILEY,
Secretary, 18 *Billiter St., London, E. C.*
THEODORE McKENNA,
Solicitor, 17 & 18 *Broughall Street, London.*

KINGDOM OF GREAT BRITAIN AND IRELAND, }
City of London. }

Be it remembered that on this tenth day of October one thousand eight hundred and eighty-eight at London before me the undersigned Tobius Gainsford Ridgway of London notary public person-

ally came Friedrich Carl August Hartmann to me known to be a partner in the firm of Hartmann Brothers described in the foregoing instrument who executed the said instrument on behalf of his said firm and acknowledged that he did so for the purposes therein mentioned.

Quod attestor.

TOB. G. RIDGWAY, *Not. Pub.*

Postage & revenue, one shilling.

Recorded Nov. 8th, 1888.
TOBIAS GAINSFORD RIDGWAY,
Notary Public.

320 EXHIBIT "P P."

Extract of the grant and covenants of Suter, Hartmann & Rahtjen's Composition Company, Ltd. (called the English Company), with the Rahtjen's American Composition Company (called the American Company).

"The English Company hereby sells, assigns, and conveys to the American Company, the good will of its business throughout the United States of America and its right to the trade-marks now belonging to and used by the English Company in America. * * * The English Company hereby covenants and agrees not to carry on any business in the United States of the same or a like character as that which has been heretofore carried on by them in the said United States of America."

EXHIBIT "R R."

JAN'Y 29. 9.

Messrs. Darrah & Elwell, Philadelphia.

GENTLEMEN: I received through Mr. Maecker at about 3 p. m. this day an order from you for five drums priming & 5 drums anti-fouling (Rahtjen's compositions) paint, which I immediately shipped p'r Penn. R. R. to your address, according to instructions. I herewith beg to inform you that I have been appointed sole agent for Rahtjen's compositions, and shall hereafter be pleased to fill
321 your orders promptly, upon the same terms as Mr. Maecker has done. Enclosed please find bill, and receipt for same.

Respectfully yours,
(S'g'd) OTTO L. PETERSEN.

P. S.—Not able to send your shipper's receipt this evening. Will send it by tomorrow's mail.

O. L. P.

EXHIBIT "S S."

John A. Donald & Co., 18 Broadway, Wells building, New York (agents).

Highest award (Medal) Crystal palace.	December, 1892.	Highest award (Medal) Calcutta.

Registered (cut of propeller) trade-mark.

Holzapfel's compositions have been ordered during the month of December, 1892, among others, for the following steamers, their total tonnage being 351,324 tons gross.

(*List of Steamers.*)

For those vessels against the name of which an asterisk (*)
322 is placed, soapstone composition only was ordered, and for those marked § both anti-fouling and soapstone composition.

Holzapfel's Compositions Company, Limited, Quayside, Newcastle-upon-Tyne.

And branches at 57 Frenchurch street, London, E. C.; 12 Waterloo street, Glasgow; 3 Chapel street, Liverpool; Mount Stuart square, Cardiff.

Agencies at all principal ports in the world.

John A. McDonald & Co., 18 Broadway, Wells bldg., New York (agents).

Highest award (Medal) Crystal palace.	January, 1893.	Highest award (Medal) Calcutta.

Registered (cut of propeller) trade-mark.

Holzapfel's compositions have been ordered during the month of January, 1893, among others, for the following steamers, their total tonnage being 226,806 tons gross.

(*List of Steamers.*)

We have pleasure in giving our numerous friends and customers the result of our last year's trading as follows: Our composi-
323 tions have been supplied to 1,934 vessels during the twelve months, having a tonnage of 3,382,001 tons. (List.)

Holzapfel's compositions have also been supplied to vessels of the following navies:

(*List.*)

and to many foreign steamship companies, from whom names of vessels painted have not been received.

For those vessels against the names of which an asterisk (*) is placed, soapstone composition only was ordered, and for those marked § both anti-fouling and soapstone composition.

Holzapfel's Compositions Company, Limited, Quayside, Newcastle-upon-Tyne.

And branches at 57 Fenchurch street, London, E. C.; 3 Chapel street, Liverpool; 12 Waterloo street, Glasgow; Mount Stuart square, Cardiff.

Agencies at all principle ports in the world.

324 EXHIBIT "T T."

Holzapfel's "Rahtjen's patent"—trade-mark (cut of propeller)—composition

has recently been applied to the following United States Government vessels at the various navy yards and dry docks throughout the United States.

(Picture of battleship.)

U. S. Battleships.

Illinois	11,525 tons.	Mayflower	1,475 tons.
Kentucky	11,525 "	Helena	1,392 "
Kearsarge	11,525 "	Wilming.	1,392 "
Iowa	11,340 "	Castine	1,177 "
Oregon	10,288 "	Wampatuck	324 "

U. S. Cruisers.

New York	8,200 "	Amphitrite	3,990 "
Buffalo	7,080 "		
Newark	4,098 "	*U. S. Hospital Ship.*	
Detroit	2,089 "	Solace	3,802 "

U. S. Gunboats.

U. S. Monitors.

U. S. Hospital Ship.

Holzapfel's International composition.

U. S. Transports.

Pennsylvania	3,343 tons.	City of Puebla	2,624 tons.
Australia	2,755 "	Zealandia	2,489 "
		Valencia	1,598 "
		Indian	1,577 "

HOLZAPFEL'S COMPOSITIONS CO., LTD.,
18 *Broadway, New York.*

325 EXHIBIT "U U."

(1.)

1871, No. 7382 B.

LIBRARY OF CONGRESS, *To wit:*

Be it remembered that on the fifth day of August, 1871, Henry Gelien, of Hoboken, N. J., has deposited in this office the title of a print the title or description of which is in the following words, to wit: Rahtjen's Composition Paints, the right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

(Stamp.)

I hereby certify that the foregoing is a true copy of the original record of copyright.

In witness whereof, the seal of the Librarian of Congress has been hereto affixed this thirteenth day of October, 1899.

Office of the register of copyrights, Washington, D. C.
Written—G. F.—Date, 13-10-'99.
Revised J. W. C. " 13-10-'99.
Mailed M. C. " 13-10-'99.

HERBERT PUTNAM,
Librarian of Congress,
By THOWALD SOLBERG,
[SEAL.] *Register of Copyrights.*

326 (2.)

LIBRARY OF CONGRESS,
COPYRIGHT DEPARTMENT,
WASHINGTON, D. C.

I hereby certify that two copies of the print entitled Rahtjen's Composition Paints were deposited in this office by Henry Gelien, Hoboken, N. J., on the fifth day of August, 1871, and were credited on entry No. 7382 B of 1871, to complete copyright.

In witness whereof the seal of the Librarian of Congress had been hereto affixed, this thirteenth day of October, 1899.

HERBERT PUTNAM,
(Stamp.) *Librarian of Congress,*
[SEAL.] By THOWALD SOLBERG,
Register of Copyrights.

327 EXTRACTS FROM EXHIBIT "H H."

* * * * * * *

The first schedule above referred to—

Part 1.

An agreement made the 14th day of February, 1880, between John Rahtjen and Heinrich Rathjen carrying on business under the firm of "John Rahtjen" of 2 Dod street Limehouse in the county of Middlesex as manufacturers of paint for the bottoms of steamships and other submerged surfaces of the first part George Frederick Heyl of Charlottenburg in the Empire of Germany now residing at De Keysers Royal Hotel Blackfriars in the city of London of the second part and William Hartmann George Hartmann and August Hartmann of Blackheath in the county of Kent about to carry on business under the firm of Hartmann Brothers in London of the third part. Whereas the said firm of John Rahtjen have for some time past carried on the said business of paint manufacturers upon a certain leasehold.

* * * * * * *

and the said firm are also entitled to the patents specified in the second schedule hereto and the rights and privileges secured thereby

* * * * * * *

Now it is hereby agreed between the parties hereto as follows:

1. The firm of John Rahtjen (hereinafter referred to as the vendors) will on or before the first day of April, 1880, execute and procure all other necessary parties (if any) to execute a proper legal assignment to the purchasers of the said leasehold premises.

* * * * * * *

328 2. The vendors shall sell and the purchasers purchase all the machinery and plant (not being included in the said lease) belonging to the vendors and used in or about the said manufactory or for the purposes of the said manufacture or sale of the said plant.

* * * * * * *

7. The vendors shall on or before the 1st day of April, 1880 execute and procure all proper parti.s to execute to the purchasers a sufficient legal assignment of all the patents mentioned in the second schedule hereto and the purchasers shall have the exclusive benefit of the said patents and of manufacturing and selling the patent composition the subject of the said patents or any of them in the countries and places mentioned and set forth in the fourth schedule hereto.

* * * * * * *

10. The purchasers shall from the date of this agreement down to the 31st of December, 1890 pay to the vendors a royalty of — for

every hundredweight of paint for bottoms of steamships or other submerged surfaces manufactured according to any of the patent processes the subject of any of the patents hereinbefore referred to or any combination of the same and sold during that period by the purchasers.

* * * * * * *

14. Neither of the said John Rahtjen and Heinrich Rahtjen shall at any time from the date hereof down to the 31st of December, 1890 either solely or jointly with or as agent of or manager for any other person or persons firm or firms company or companies directly or indirectly carry on or be engaged or concerned or interested in the business of manufacturing or selling in any of the places or countries mentioned in the fourth schedule hereto any composition for bottoms of steamships or other submerged surfaces or permit or suffer the name of the said firm of John Rahtjen or either of
329 their names to be used or employed in carrying on or in connection with any such trade in the United Kingdom or the colonies or any of the countries aforesaid.

* * * * * * *

16. The purchasers hereby at the request of the vendors and of the said George Frederick Heyl agree to appoint as their sole consignees of all paint manufactured by them as hereinbefore mentioned Messieurs Suter Hartmann and Company of 18 Billiter street in the city of London on the said Messieurs Suter Hartmann and Company entering into a proper agreement not to introduce into the market any other paint for the bottoms of steamships and the aforesaid William Hartmann party hereto of the third part hereby agrees as a partner in and on behalf of the said firm of Messieurs Suter Hartmann and Company to accept the said appointment upon the said terms.

17. The said purchasers shall not without the consent in writing of the said vendors and the said George Frederick Heyl part with the said letters patent or with the good will of the said business nor shall they disclose or make known to any one the mode of manufacturing the said paint or the secret thereof or any of the processes relating thereto.

* * * * * * *

SCHEDULE 2.

Letters patent dated the 24th May 1875 granted to John Henry Johnson for—

Letters patent dated the 29th November 1873 granted to Heinrich Rahtjen for an improved anti-fouling and preservative composition for ships' bottoms and other submerged structures.

* * * * * * *

10710

RAHTJEN'S COMPOSITION PAINTS,

KNOWN AS THE

GERMAN PAINT

FOR PAINTING THE BOTTOMS OF IRON & WOODEN SHIPS & BOATS,

TO PREVENT RUST, BARNACLES &c.

HENRY GÉLIEN

SOLE AGENT FOR THE UNITED STATES

REFERENCES:

MESSRS. OELRICHS & CO., 2 Bowling Green, New York, or the CAPTAINS OF THE NORTH GERMAN LLOYD STEAMERS in Port, in New York, Baltimore, or New Orleans.

OLD DOMINION STEAMSHIP CO., Pier 37, N. R., New York.
NEW YORK AND NORWICH TRANS. CO., " 40, " "
BRIDGEPORT STEAMBOAT CO., " 35, E. R., "
DELAWARE IRON WORKS, 23rd St., N. R., "
HARLAN & HOLLINGSWORTH COMPANY, Wilmington, Delaware.
SINCLAIR STUART, ESQ., Superintending Inspector and Secretary of Steamboat, &c., &c.,

MESSRS. C. H. MALLORY & CO., 108 Mallory Line, New York.
MESSRS. H. B. CROMWELL & CO., 86 Wall Street, "
WILLIAM P. CLYDE, ESQ., 142 Wall Street, "
HERMAN WINTER, ESQ., Consul, Hamburg, Metropolitan & Old Dominion S.S.Co.
WM. M. RICHARDS, ESQ., Pilot Boarded, Philadelphia.
New York Lloyds, 70 Wall Street, New York.

OFFICE AND DEPOT,

P.O. BOX 92. 167 WASHINGTON STREET, HOBOKEN, N. J.

Complainant's Exhibit 'R'
REDUCED FROM
20¼ x 15¾ inches.

332

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Complainant's Exhibit "Y."
REDUCED FROM
17¾ x 22½ inches.

FOR COATING SHIPS' BOTTOMS &c.
REFERENCES
SOLE CONSIGNEES FOR GREAT BRITAIN
SUTER, HARTMANN & Co
E.C. LONDON & 12, RUMFORD PLACE, LIVERPOOL.

No. 107
Halpenny Bulwer
Ralston Co. } p. 334

330 SCHEDULE 4.

The United Kingdom of Great Britain and Ireland and the colonies thereof.
France and the colonies thereof.
Spain and the colonies thereof.
Russia, China, Brazil.
Austria.
Italy.
Egypt.
Japan.
United States of America and West Coast of South America.

Part 2.

Contor Stubbenhuk 11, Fabrik Hafenshasse 69.

HAMBURG, *27th January*, 1883.

Messrs. Hartmann Bros., 2 Dod street, E., London.

DEAR SIRS: Referring to our conversation I hereby agree to accept from the 1st February 1883 until the expiration of the present contract a royalty of — per cent. on all numbers of Rahtjen's patent compositions disposed of by you instead of the royalty originally fixed in contract between us and dated the 14th February 1880.

It is further agreed that you shall be at liberty to manufacture and sell a composition for ships' bottoms similar to the one now under trial. The royalty for me on such composition to be — per cwt., on the priming and — per cwt. on the antifouling.

This agreement is to be a substitute clause for No. 15 in the present contract.

I shall be much obliged by your corresponding reply in due course and remain,

Dear sir, yours faithfully, JOHN RAHTJEN.

331 Part 3.

LONDON, *January 29th*, 1883.

Messrs. Hartmann Bros., London.

DEAR SIRS: I hereby agree to accept from the 1st February, 1883, until the expiration of our present contract a royalty of — per cwt. on No. I and — per cwt. on anti-fouling No. II and No. III Rahtjen's composition instead of the royalty originally fixed in contract between us and dated the 14th February, 1880.

It is further agreed that you shall be at liberty to manufacture and sell a composition for ships' bottoms similar to the one now under trial the royalty for me on such a paint or any other composition for ships' bottoms to be — per cwt. on the priming and — per cwt. on the anti-fouling composition.

This is to be a substitute for clause No. 15 in the said contract.

An answer word by word corresponding to the above would oblige,

Yours truly, GEORGE FRED'K HEYL.

(Here follow lithographs marked pp. 332, 333, and 334.)

336 United States Patent Office.

HARTMANN, LE DOUX & MAECKER, of New York, N. Y.

Trade-mark for Prepared Paint.

Statement and declaration of trade-mark No. 12336, registered June 23, 1885. Application filed May 26, 1885.

Statement.

To all whom it may concern:

Be it known that we, Hartmann, Le Doux & Maecker, a firm domiciled and doing business in the city, county, and State of New York, have adopted for our use a trade-mark for prepared paint, of which the following is a full, clear, and exact description.

Our trade-mark consists of the arbitrary words "Rahtjen's composition." This has generally been arranged as shown in the accompanying fac-simile, in which it appears in plain block letters printed, in black, in a horizontal line; but other forms of type may be employed, or it may be differently arranged or colored without materially altering the character of our trade-mark, the essential feature of which is the words "Rahtjen's composition."

This trade-mark has been used continuously in business by us and those from whom we derive our title since 1878.

The class of merchandise to which this trade-mark is appropriated is paints, and the particular description of goods comprised in such class on which it is used by us is prepared paint.

It has been our practice to stencil the trade-mark on the packages containing the paint, and to print it upon labels to be applied to the said packages.

HARTMANN, LE DOUX & MAECKER,
Per EMIL MAECKER.

Witnesses:
EDGAR TATE.
JAMES M. HENLEY.

(Here follows lithograph marked p. 335.)

Declaration.

STATE OF NEW YORK, }
County of New York, } ss:

Emil Maecker, a member of the firm of Hartmann, Le Doux & Maecker, of the city, county, and State of New York, being duly sworn, deposes and says that said firm is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said firm has at this time a right to the use of the trade-mark herein described; that no other person, firm, or cor-

1067

No. 10,167
Asbolyaspalte Co
Rahtjens Co. } Ap. 335

TRADE-MARK.

HARTMANN, LE DOUX & MAECKER.

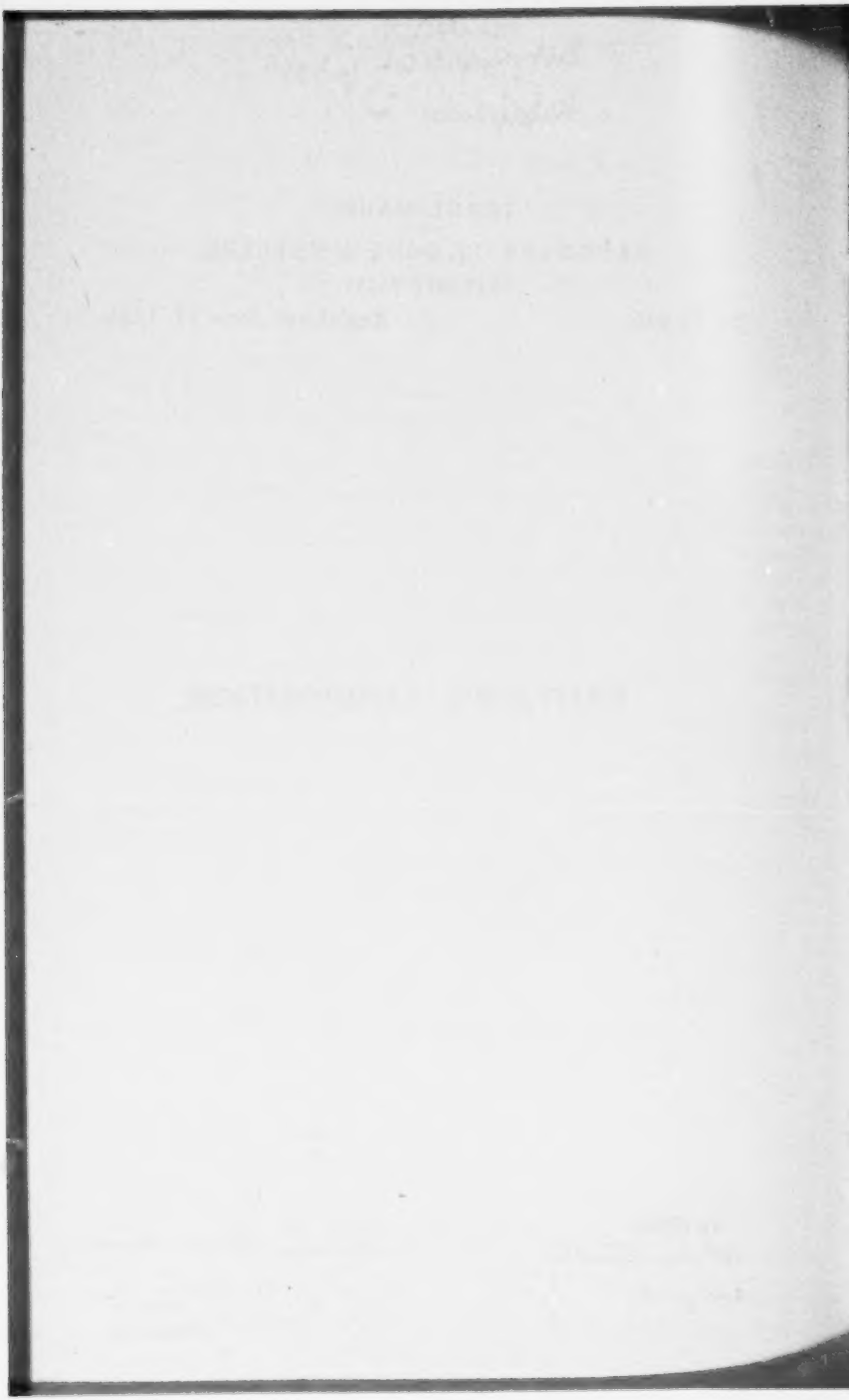
PREPARED PAINT.

No. 12,336. Registered June 23, 1885.

RAHTJEN'S COMPOSITION.

WITNESSES:
F. M. Antle.
A. Lanzenick

Hartmann, Le Doux & Maecker
BY Munn & Co.
ATTORNEYS.



poration has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by said firm in commerce with Great Britain; that the description and fac-similes presented for record truly represent the trade-mark sought to be registered, and that he is a subject of the Emperor of Germany.

EMIL MAECKER.

Sworn and subscribed before me, a notary public, this 25th day of May, 1885.

[L. S.]

EDGAR TATE,
Notary Public, New York.

338 United States Patent Office.

SUTER, HARTMANN & RAHTJEN'S COMPOSITION COMPANY (LIMITED), of London, England.

Trade-mark for Paints, Compositions, Anti-corrosives, and Anti-foulers.

Statement and declaration of trade-mark No. 17035, registered September 17, 1889. Application filed December 14, 1888.

Statement.

To all whom it may concern:

Be it known that the Suter, Hartmann & Rahtjen's Composition Company, (Limited), a limited company incorporated under the limited liability acts of Great Britain, carrying on business at 18 Billiter street, in the city of London, England, merchants and manufacturers, has adopted and uses a trade-mark for paints, compositions, anti-corrosives, and anti-foulers, of which the following is a full, clear, and exact specification.

The trade-mark sought to be protected by the application in connection with and as part of which this statement or specification is made consists of the representation of an open hand with the fingers upward, above which is the word "composition," and below it the words "Hartmann's manufacture." These have been generally arranged as shown in the accompanying fac-simile, the hand being usually colored red; but the style of lettering is unimportant and the arrangement and color may be changed without affecting the trade-mark, the essential feature of which is the representation of an open hand.

This trade-mark said company and its predecessors in business have continuously used in business since January, 1884.

The class of merchandise to which the trade-mark is appropriated is paints and painters' supplies, and the particular class of goods on which said company uses the said trade-mark is paints, compositions, anti-corrosives, and anti-foulers of all descriptions.

It has been the practice to apply the said trade-mark to the casks, drums, and receptacles containing the goods by stenciling or by

labels and other suitable ways, and said company claims the right to use it in all usual and proper ways and colors.

SUTER, HARTMANN & RAHTJEN'S COMPOSITION COMPANY (LIMITED),
By H. W. SAYER, *Chairman.*
WM. HARTMANN,
AUG. HARTMANN, *Directors.*
F. J. BAILEY, *Secretary.*

Witness:
TOB. G. RIDGWAY,
Not. Pub., London.

(Here follows lithograph marked p. 337.)

Declaration.

ENGLAND, CITY OF LONDON, } ss:
Great Britain, }

Frederick John Bailey, being duly sworn, deposes and says that he is secretary to Suter, Hartmann & Rahtjen's Composition Company, (Limited), named in the foregoing statement; that he verily believes that the foregoing statement is true; that the applicants have at this time a right to the use of the trade-mark therein described, and referred to in the foregoing letter of advice, a fac-simile of which is attached to this declaration and made a part thereof; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it (the said trade-mark) is used in commerce between Great Britain and the United States of America; that the description and fac-similes presented for record truly represent the trade-mark sought to be registered, and that he is a British subject, and the said company is a company duly registered in Great Britain according to law.

FREDERICK JOHN BAILEY.

Sworn and subscribed before me this twelfth day of November, 1888. Witness my hand and official seal.

[L. S.] TOB. G. RIDGWAY, *Not. Pub.*

No. 107
Holzapfel's
Rahtjens Co.

TRADE-MARK.

SUTER, HARTMANN & RAHTJENS COMPOSITION COMPANY, (Limited.)

PAINTS, COMPOSITIONS, ANTI-CORROSIVES AND ANTI-FOULERS.

No. 17,035. Registered Sept. 17, 1889

Suter Hartmann & Rahtjen
composition company Limited
Proprietor

WITNESSES:
Maggie Turner
Ella J. Bouldin

BY Pruett Stewart
ATTORNEY

339 United States Circuit Court for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION CO., Complainant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant. } In Equity.

Proofs for final hearing taken on behalf of the defendant under the 67th rule of the supreme court for courts in equity, as amended, before Benjamin Barker, one of the examiners of this court, at 18 Broadway, in the city of New York, at 11 o'clock in the forenoon on the 15th day of July, 1899.

Present: R. B. McMaster, Esq., of counsel for defendant; also William McAdoo, Esq.; T. D. Merwin, Esq., on behalf of the complainant.

ELLIOT I. G. ANDRESEN, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

1 Q. What is your name, age, residence and occupation?

A. Elliot I. G. Andresen; 36 years old; Richmond borough, New York city; assistant manager of Holzapfel's Compositions Company, Limited, in New York city.

2 Q. How long have you been assistant manager of the defendant company?

A. I have been assistant manager of Holzapfel's Compositions Company, Ltd., in New York here since 1894.

3 Q. Was that the time that the defendant company was
340 formed?

A. I don't know when the defendant company was formed; I don't know the date.

4 Q. Prior to the time in 1894, when you became assistant manager of the defendant company in New York what was your business or occupation?

A. I acted very much in the same capacity in the service of John A. Donald & Company.

5 Q. Where was John A. Donald & Company's place of business?

A. I have known John A. Donald & Company's place of business to have been at No. 84 Broad street, New York city, and afterwards at 18 Broadway, New York, and it remained at 18 Broadway, New York, up to the time of the first of April, 1894.

6 Q. What took place at that time?

A. Holzapfel's Compositions Company, Limited, of Newcastle-upon-Tyne, England, took all over the business of John A. Donald Company.

7 Q. And after that in whose name was the business carried on?

A. Holzapfel's Compositions Company, Limited.

8 Q. What is and was the character of the business carried on by the defendant corporation?

A. It was cleaning and painting the bottom of ships and steamers

and selling in the open market compositions for this purpose of their own manufacture.

9 Q. What was the name of the compositions which were manufactured and sold by the defendant company?

A. Soapstone composition, Deck composition, National composition, International composition, and Genuine Rahtjen's composition Holzapfel's manufacture; Danby's composition.

10 Q. And what was the character of the business carried on by John A. Donald & Company?

A. Exactly of the same nature as Holzapfel's Compositions Company, Limited, during the time I was in the service of John A. Donald & Company.

11 Q. When did you enter the service of John A. Donald & Company?

A. In the spring of 1891.

341 12 Q. Do you know when John A. Donald & Company first engaged in the business of handling or selling said Holzapfel's Rahtjen's composition?

A. From my own personal knowledge—in other words, having seen the paint sold by John A. Donald & Company, my knowledge upon this point goes back to the time when I joined said firm in the spring of 1891; otherwise, the knowledge I have of said firm having sold this paint is based upon having seen invoices of importation, tenders quoting prices, bidding in the open market to paint vessels' bottoms with this paint, and other instances of a similar nature.

13 Q. And that knowledge last referred to in your answer goes back to what time?

A. I should say, during the early part of 1889.

14 Q. Prior to 1891, when you entered John A. Donald & Company's firm, had you visited their office, and, if so, on more than one occasion?

A. Yes, sir.

15 Q. Did you visit their office many times between 1889 and the spring of 1891?

A. No, I can't say so very many times; but I visited the office often enough for the purpose which I went there.

16 Q. Do you know how John A. Donald & Company advertised or held out to the public, or sold the said Holzapfel's Rahtjen's composition?

A. The first time I saw Holzapfel's Rahtjen's composition was seeing the name on a sign in Broad street.

17 Q. Whose sign?

A. John A. Donald & Company's sign.

18 Q. Have you that sign here?

A. Yes.

Defendant's counsel offers in evidence the sign produced by the witness, and the same is marked, "Defendant's Exhibit Donald & Company's Sign."

19 Q. Do you know of any cards or letter-heads, or memorandums

or bill-heads of the old firm of Donald & Company, which are now in existence?

A. I do.

20 Q. Can you produce the same?

A. I can.

21 Q. Please do so.

342 A. I now produce them and tell what they are. I produce first a letter written on letter-head of John A. Donald & Company, 84 Broad street, New York, dated August 6th, 1889, from John A. Donald & Company to Capt. F. C. Miller; next I produce an estimate on the printed estimate form of John A. Donald & Company, 84 Broad street, dated December 12th, 1889, to Messrs. Bowring & Archibald; I next produce an estimate on a printed estimate blank of John A. Donald & Company, 18 Broadway, New York, dated June 21st, 1890, to Capt. Lardner; I also produce an advertisement of John A. Donald & Company, appearing in the "New York Marine Register," June 4th, 1890. I also produce in evidence business card of N. T. Gorham, the Boston agent of John A. Donald & Company.

Defendant's counsel offers in evidence the letter-head, printed estimate, advertisement, business card, &c., produced by the witness on his last answer, and the same are now marked respectively, "Defendant's Exhibit Donald & Company's Letter-head of August, 1889;" "Defendant's Exhibit Printed Estimate of Donald & Company of December 12th, 1889;" "Defendant's Exhibit Printed Estimate of Donald & Company, June 1st, 1890."

Defendant's counsel also offers in evidence (complainant's counsel consenting that a true copy of the advertisement may be introduced in place of the advertisement itself, subject to comparison with and correction by the original) a copy of the advertisement of Donald & Company in the "N. Y. Maritime Register" of June 4, 1890; and the same is marked "Defendant's Exhibit Donald & Company's Advertisement of June 4th, 1890."

Defendant's counsel also offers in evidence the business card of N. T. Gorham, and the same is marked "Defendant's Exhibit Donald & Company's Agent's Card."

343 Objected to by counsel for complainant as incompetent and immaterial.

22 Q. State the volume of the business done by John A. Donald & Company during their first year in business, or thereabouts, and the general volume of business done by the defendant during the year 1898; in answering this question I wish you to confine yourself to the business done in said Holzapfel's Rahtjen's composition?

Objected to as incompetent, irrelevant and immaterial, and further because not calling for the best evidence.

A. In regard to that question, it is rather difficult to state with exactness the entire volume of business as regards of the sales of Holzapfel's Rahtjen's composition; but I will answer the question to the best of my knowledge, basing my knowledge upon books that I have handled dealing with this subject. In 1889, beginning of '91,

I judged the volume of business to have been, roughly speaking, between $7,000 and $8,000 worth; increasing gradually until April, 1894, to, roughly speaking, about $14,000 worth, when John A. Donald & Company turned their business over to Holzapfel's Compositions Company. From 1894 up to the present time, or up to the end of last year rather, the sale of Rahtjen's composition, Holzapfel's manufacture, has averaged from about $22,000 in 1894 to about $45,000 in 1898.

23 Q. With whom was this business of Donald & Company and of the defendant corporation done?

A. It was done with captains of sailing vessels and steamers by selling to agents along the coast, as also painting vessels belonging to regularly established steamship lines. Or through business firms in New York city, representing foreign vessels when in New York or neighboring ports.

24 Q. Indicate in a general way the character of these customers.

344 A. R. W. Cameron & Company; W. R. Grace & Company; W. W. Hulbert & Company, a firm not now in existence, but whose business was taken over by the firm Bennet, Walsh & Company, whose work of this character we, to a large extent, maintain up to the present date; Prince line of steamers, the agent of the line in New York is John C. Seager; Vernon H. Brown & Company; Henderson & Company, agents of the Anchor line; American line; Compania Transatlantica Espanola—agents, S. M. Ceballos & Co.; and innumerable others, which, if you want to spend the time, can be picked out from any advertisement calendar or city register.

25 Q. State whether or not Donald & Company or the defendant corporation have ever met in competition Mr. Otto L. Petersen or the complainant corporation in regard to the sale or use of the Rahtjen's composition, made by defendant and complainant companies, respectively.

A. As a general custom, when talking about one's paint, or, for all that, any article of merchandise, it doesn't very frequently happen that you wish or seek to talk about your goods in the personal presence of a direct opponent, selling goods of a similar character; so, for this reason, I cannot say that I personally, as far as my memory goes, in the days of John A. Donald & Company, met the Mr. Petersen offering his Rahtjen's compositions for sale to the same party and at the same moment as I did so myself. I can distinctly remember, however, having met Mr. Petersen as a competitor when I offered on behalf of Holzapfel's Compositions Company to paint a certain army transport steamer with our Holzapfel's Rahtjen's composition when Mr. Petersen offered to paint the same vessel with his Rahtjen's composition of his firm's manufacture. This was during 1898.

26 Q. Do you know, of your own knowledge, whether or not Mr. Petersen or the complainant company, knew that Donald & Company was selling Holzapfel's Rahtjen's composition in this market?

345 A. Generally speaking, I should say, "Yes." For this reason, that, going back as far as 1891, I know of our Rahtjen's composition having been put up in cans, plainly marked and stenciled with our trade-mark and firm's name and firm's style, and these cans, as the tendency of our business or the tendency of the business of Donald & Company was to increase, were exposed in greater and greater numbers to public view around and at the different dry docks in New York city, as well as Brooklyn, and I can specially remember one instance, viz., in 1891, when the firm of John A. Donald & Company painted a sailing vessel of the name "Rhone" in the Erie Basin dry dock, which dock is an excavated dock and is very deep. At intervals around the dock were skids generally placed there for the purpose of sliding paint and other merchandise down to the bottom of the dock and at the first skid at the right-hand side, facing the basin, were a number of our drums containing Rahtjen's composition of our manufacture gathered and exposed to view, awaiting the time of being lowered down the dock. Besides myself being present at the dry dock at that time for the purpose of superintending the application of the Rahtjen's composition of our manufacture to the bottom of said ship "Rhone," was also Mr. John A. Donald in person. Besides myself and Mr. Donald, Mr. Otto L. Petersen was also present, and I remember distinctly said Otto L. Petersen walking up from the offices of the then Handrey & Robbins Company, which office is situated right next to the dry dock in question, up to very close to our Rahtjen's paint heretofore mentioned as being placed at the first gate at the right-hand side of the dock, where he recognized, walked around and looked at our drums; whereupon Mr. Petersen at the first chance he had of getting the ear of the captain of the ship "Rhone," walked him from where our drums were situated back to a paint locker situated near the gate entrance of the Erie Basin dry docks, where he had exposed to view a number of his own paint drums. Mr. Petersen and the
346 captain remained in conversation for a short time walking up and down, when the captain again returned to the dry dock and told me to proceed and paint the vessel with our genuine Rahtjen's composition of Holzapfel's manufacture, which we did, and I saw that the work was done and was done well, personally.

27 Q. Was any protest or objection made to you or to John A. Donald & Company by Mr. Petersen or the complainant company against the use of the words "Rahtjen's composition," or substantially those words, on said drums of defendant company?

A. No, indeed, there were no protests made to me personally or to the firm of John A. Donald & Company, as far as my knowledge goes.

28 Q. Was any protest or objection ever made to you or to the firm of John A. Donald & Company or to the defendant company by Mr. Petersen or the complainant company in respect to the use by Donald & Company or the defendant company of the words "Rahtjen's composition," or substantially those words, prior to the commencement of the present suit?

A. No, not to my knowledge.

29 Q. Mr. Petersen testified substantially to the effect that prior to the Government contracts of last year he had no knowledge that Donald & Company, or the defendant corporation, was selling a "Rahtjen's composition" manufactured by the defendant or by Holzapfel & Company. Is that testimony correct?

A. I am under the impression that Mr. Petersen testified to the above effect.

30 Q. You misunderstood my question. I mean whether or not Mr. Petersen's testimony to that effect is correct and true?

Objected to as incompetent, immaterial, and that it calls for the testimony of the witness as to the recollection of a prior witness.

347 A. I knowing and having seen Mr. Otto L. Petersen scrutinize and look at our Rahtjen's drums at the dry docks, have no hesitation in saying if Mr. Petersen has testified that he has had no knowledge of the firm of John A. Donald, or of the Holzapfel's Compositions Company, Limited, having sold, used and applied to ships' bottoms their Rahtjen's paint prior to the time when Holzapfel's Compositions Company, Ltd., bid for the Government contracts for this paint in 1898, it is untrue and not correct.

31 Q. Do you recall any specific instances where Donald & Company, or the defendant corporation and Mr. Petersen, or the complainant company, competed for painting the bottom of vessels with the respective Rahtjen's composition?

A. As far as my knowledge goes, the complainant company when bidding to paint the bottom of vessels with any compound, is understood to mean their Rahtjen's composition. The defendant company when offering to paint vessels in a similar way have as frequently offered to paint ships and steamers and other vessels with their Rahtjen's compound, as well as any other which they might have handled. But having a specific recollection of certain vessels it is rather asking too much, inasmuch specifically from our side no interest is taken in that matter, we tendering almost daily, year in and year out, and offering and have offered to coat almost any and all ships and steamers which in all these years have been in the market here in New York city, with our Rahtjen's composition, as well as our International composition, so that people can take and choose whichever they like.

32 Q. Will you examine the office books of Donald & Company and see if you find therein any data, and, if so, what, to show that Donald & Company painted, in the years 1890 and '91, the vessel "Star of the East" with Rahtjen's composition?

Objected to as incompetent, irrelevant and immaterial.

348 A. I do not know what time it will take to ascertain this from the books, but that it can be done I am positive of.

33 Q. Please look at the books and tell me what you find.

A. In the letter book of John A. Donald & Company for 1890, on page 10, I find the following entry:

"18 BROADWAY, *May* 3, 1890.

"Messrs. owners of bark 'Star of the East,' per Messrs. R. W. Campbell & Company, Dr. to John A. Donald & Co., agents for Holzapfel's Compositions Co., Ltd.

May 3. To cleaning, scraping, rigging and unrigging stages, painting water marks, applying and supplying two coats of 'Rahtjen's' patent anti-corrosive and anti-fouling compositions, as per agreement..... $220"

In the letter book of said firm for 1891, on page 382, I find the following entry:

"18 BROADWAY, 1*st May*, 1891.

"Messrs. owners of barque 'Star of the East,' Drs. to John A. Donald & Co., agents for Holzapfel's Compositions Co., Ltd.

"Ap'l 29. To cleaning, scraping, rigging and unrigging stages, painting in water marks and applying and supplying two coats of 'Rahtjen's' genuine patent compositions on vessel's bottom up to deep-load line, as per agreement.. $250 00"

Defendant's counsel offers to complainant's counsel for his inspection and use on cross-examination said books from which the witness has read.

349 Complainant's counsel objects to the foregoing being received in evidence on the ground that the same is irrelevant, incompetent and immaterial.

34 Q. Will you please examine the office books of Donald & Company and see if you find therein any data, and, if so, what, to show that Donald & Company painted in the year 1889 or 1890 the steamships "Dorian" and "Sidonian" for Henderson Bros., and in the year 1890 the steamship "Tyrian"?

A. I can and now do so. In the letter book of John A. Donald & Company for the year 1889, on page 132, I find the following entry:

"84 BROAD STREET, 15*th Nov.*, 1889.

"Owners of S. S. 'Dorian,' per Messrs. Henderson Bros., to John A. Donald & Co.

"Nov. 4. To scraping, cleaning, staging and applying two coats of 'Rahtjen's' patent anti-corrosive paint, painting boot top, as per agreement..... $250"

And on page 304, I find the following entry:

"84 BROAD STREET, 30*th Nov.*, 1889.

"Messrs. owners of S. S. 'Sidonian,' per Messrs. Henderson Bros., to John A. Donald & Co.

Nov. 29. To scraping, cleaning, rigging and unrigging stages, applying and supplying two coats of 'Rahtjen's' patent composition, as per agreement $300

In the next letter book of said firm for 1890, I find on page 406 the following entry:

"18 BROADWAY, 19*th July*, 1890.

"Messrs. owners of S. S. 'Tyrian,' per Messrs. Henderson Bros.
Drs. to John A. Donald & Co., agents for Holzapfel's compositions Co.

July 18. To cleaning, scraping, rigging and unrigging stages, painting in water marks, and applying two coats of 'Rahtjen's' genuine anti-corrosive & anti-fouling composition on steamer's bottom, as per agreement... $265

And on page 123 of the letter book for 1890, I find the following entry:

"84 BROAD STREET, 9*th Jan'y*, 1890.

"Messrs. owners of ship 'Wynnstay,' per Messrs. Henderson Bros.
Drs. to John A. Donald & Co.

Jan'y 2. To cleaning, scraping, rigging and unrigging stages and applying and supplying two coats of 'Rahtjen's' patent anti-corrosive & anti-fouling compositions on bottom, also painting vessel's sides with 2 coats lead color, painting ports and bulwarks black up to rail, as per agreement..... $500

Defendant's counsel offers to complainant's counsel for his inspection and use of cross-examination said books from which the witness has read.

Complainant's counsel objects to the foregoing being received in evidence on the ground that the same is irrelevant, incompetent and immaterial.

35 Q. State whether or not there has been a large number of vessels painted with Holzapfel's Rahtjen's composition in the port
351 of New York, from the time that Donald & Company started business up to the present time under the management of John A. Donald & Co., first as agents, and afterwards as managers of the New York office?

A. Yes, quite a number.

36 Q. And in all those cases the composition is delivered at the dry dock or wherever else the painting takes place, in what kind of vessels or receptacles?

A. In sheet-iron drums.

37 Q. Is that a common form of putting up paint in the paint trade generally?

A. Yes, it is; very common.

38 Q. Are the defendant's drums marked or stenciled in any way?

A. Yes, they are.

39 Q. Mr. Peterson in his redirect examination offered in evidence a copy of the stencil on the defendant's drums; can you produce the drums used by the defendant in selling its Holzapfel's Rahtjen's composition?

A. I can and now do so.

Defendant's counsel offers in evidence the drums produced by the witness and they are marked respectively "Defendant's Exhibit Defendant's Drum No. 1" and "Defendant's Exhibit Defendant's Drum No. 2."

40 Q. Mr. Peterson in his redirect examination also offered in evidence a copy of the stencil marks on the complainant's drums. Can you produce the drums used by the complainants for its Rahtjen's composition?

A. Yes, and I now do so.

Defendant's counsel offers in evidence the drums produced by the witness and they are marked respectively "Defendant's Exhibit Complainant's Drum No. 1" and "Defendant's Exhibit Complainant's Drum No. 2."

41 Q. Have you ever seen any of the complainant's drums for its Rahtjen's composition on which it did not employ the red hand?

352 A. I can't recollect that I have, in fact, I never paid any attention to whether it had a red hand or not.

42 Q. State whether or not there has been any deception or concealment on the part of the defendant company in respect to the manufacture and sale of its Rahtjen's composition.

A. No; never. In fact we have taken a certain pride in telling the public and people who have come to us for Rahtjen's compositions that they are getting Rahtjen's compositions of Holzapfel's manufacture.

Adjourned, by consent, to June 16th at 11 a. m.

NEW YORK, *June 16th*, 1899.

Met pursuant to adjournment.

Present: Counsel as before and Mr. F. P. B. Sands.

Examination continued:

43 Q. How was the composition which you furnished the U. S. Government, or rather which the defendant company furnished the Government under the contract referred to in the previous testimony, put up or marked?

A. It was put up and marked similar to those which were put in evidence yesterday (referring to drums "Defendant Exhibit Defendant's Drum No. 1," and "Defendant Exhibit Defendant's Drum No. 2").

44 Q. In what way has the Holzapfel's Rahtjen's composition been put up when handled either by John A. Donald & Company, as agents, or by the defendant company?

A. Always in sheet-iron drums.

45 Q. What is the purpose of these Holzapfel's Rahtjen's compositions?

A. The purpose of the first coating is to keep iron and steel ves-

sels from rusting or corroding, and the purpose of the second coating or No. 3 is to keep them from fouling.

353 46 Q. What is the reputation of Holzapel's Rahtjen's compositions, manufactured and sold by the defendant?

A. The reputation as far as I know is excellent.

47 Q. Have you sources of knowledge or information for knowing what the reputation of Holzapfel's Rahtjen's compositions reputation is in this market?

A. The sources I have are these. Customers of ours for this brand of paint have often testified to us of its excellent qualities, and have requested us to again to recoat such vessels upon which we may have used our Rahtjen's paint, to again recoat the vessels.

The foregoing answer objected to as being wholly irrelevant, incompetent and immaterial, and not responsive to the question.

48 Q. Mr. Petersen, in answer to cross-question 202, says: "No, "but I did find later on that the 'El Callao,' 'The Rhine,' 'Dorian,' "'Panama,' 'Ciudad Condal,' 'Mexico,' and 'Habana' were coated "with Rahtjen's composition; I will give you the dates: 'El Callao,' "September, 1893; 'Rhine,' December, '94; 'Dorian,' August, '90; "'Panama,' March, '92; 'Ciudad Condal,' March, '92; 'Mexico,' "April, '92; 'Habana,' Aug., '92; also did some inside work—paint-"ing—on the 'Panama,' May, 1892, showing that they must have "thought the Rahtjen's composition pretty good." State whether or not the defendant company has painted these vessels, or any of them, with Holzapfel's Rahtjen's composition since the respective dates given by Mr. Petersen in connection with these several vessels?

Objected to as incompetent, irrelevant and immaterial.

A. Yes; I can state that we have painted these vessels, or some of them, with Holzapfel's Rahtjen's composition since the respective dates given by Mr. Otto L. Petersen in connection with these several vessels; thus, we painted steamship "Panama" with the Holz-

354 apfel's Rahtjen's composition on October 21, 1892, and again on April 6, 1894; we also painted the steamship "Ciudad Condal" with Holzapfel's Rahtjen's composition on April 20, 1894; we also painted the steamer "Mexico" with our Holzapfel's Rahtjen's composition on September 7, 1893; also steamship "Habana" with Holzapfel's Rahtjen's composition on November 6, 1894.

Admission of the foregoing in evidence is objected to as incompetent, irrelevant and immaterial, it being understood that like objection is made to all subsequent questions based thereon and relating thereto.

Q. 49. To what line do these vessels you have named belong?

A. To the Spanish line called "Compania Transatlantica Espanola," which line for years has been running their steamers between New York and Havana.

Q. 50. Have you or not painted any of these vessels with Holzapfel's Rahtjen's composition more than once since the date given by Mr. Petersen as the date of his company's painting them?

A. Yes; we always since painted them, except on the occasion of

the date that Mr. Petersen has referred to; with that exception, we always painted these vessels since just after I entered Donald & Company's employ. It was on my solicitation that we got the business.

Q. 51. You may state how you got the business.

A. I had observed from time to time upon visiting the Erie Basin dry docks that different kinds of paint were employed in painting the above steamers. I thought that there might also be an opening to try our paint, and approached the agents here in New York and their representative. They had some sent from their office to the dry dock where their steamers were being docked and painted, and obtained in this manner an opportunity to also test our paint against some of the others which they had previously been using, thus opening up a connection; we finally succeeded upon the good results obtained with our paint to get the whole of their business.

Q. 52. What date, as near as you can fix it, did you or Donald & Company get the business of this line?

A. October 9th, 1891. And since that time, with the single exception which Mr. Petersen has given, we have always painted the vessels of that line.

Cross-examination by Mr. MERWIN:

53 X Q. How do you know that the sales of Rahtjen's compositions by John A. Donald & Co. in 1889 and beginning of 1891 amounted to $7,000 or $8,000?

A. Because when I joined John A. Donald & Co. in 1891 one of my very first tasks, so as to gather for myself as much and as thorough information about John A. Donald & Co.'s previous business, was to copy or gather in my own handwriting, statements showing what he had remitted to Holzapfel's in England for the purchase of Rahtjen's composition of their manufacture.

Complainant's counsel gives notice that he will move to strike out all evidence of this witness on the above point, because the last answer shows that he had no personal knowledge whatever of the fact to which he testified and that he is testifying merely by hearsay.

54 X Q. How do you know that in April, 1894, the sales of Rahtjen's compositions by John A. Donald & Co. amounted annually to $14,000?

A. Because I copied or have seen copies in the books of John A. Donald & Company giving similar statements to Holzapfel's Compositions Company in England for the amount of Rahtjen's paint purchased.

Complainant's counsel gives the same notice as above—that he will move to strike out the evidence of the witness on the last-named point for the same reasons.

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356 55 X Q. How do you know that "from 1894 up to the "present time, or up to the end of last year rather, the sale of

"Rahtjen's composition, Holzapfel's manufacture, has averaged from "about $22,000 in 1894 to about $45,000 in 1898"?

A. I have gathered this information, to the best of my knowledge, from statements which I made out myself concerning these questions.

56 X Q. Do I understand you, then, that you have refreshed your memory by reference to original entries made by you at the time of the transactions, and that these entries show the amount you have named?

A. If I understood exactly, or if Mr. Merwin would plainly state exactly what information he wants to get from me, I'll answer his question to the best of my ability. As Mr. Merwin has formed his present question, I do not know what information he desires to get from me.

57 X Q. I want to learn, and I ask you, if you know the facts stated in the part of your answer quoted; and, if so, how you know them? I mean by this what you yourself know, not what others have told you.

A. I know, because I have myself since 1894 compounded all the financial statements which have been rendered the head office of Holzapfel's Composition Company, of Newcastle-on-Tyne, England, by their New York office at 18 Broadway.

58 X Q. Did you yourself make the sales, or make the original entries of the sales, in the books of account of the company?

A. In great many cases I personally made the sales, and I can say in almost every instance since 1894 I have made the entries.

Counsel for complainant gives notice that he will move to strike out all of the answer of witness to direct question No. 22, of which motion of notice to strike out has not been already made, unless the witness or counsel shall produce and place in evidence under
357 proper proof the original entries showing the figures given in the answer.

59 X Q. What was the amount of sales of Rahtjen's composition by the defendant company in the United States during the calendar year of 1897?

A. Roughly speaking, $32,000.

60 X Q. I want the exact figures according to your own personal knowledge; all other statement will be objected to as incompetent?

A. I answer the question in the way I did answer it.

61 X Q. How many gallons of Rahtjen's compositions did the defendant company sell in the United States in the calendar year of 1897, including all that was used by said company in painting vessels?

A. I don't know.

62 X Q. At what prices were the Rahtjen's compositions sold by the defendant company in the United States in the year 1897?

Defendant's counsel objects to the question as immaterial and irrelevant at the present stage of the case; being material and relevant only in the event of an accounting as prayed for in the bill;

and, furthermore, that it pertains to the private business of the defendant, and that it would be manifestly unfair to furnish the data inquired for to a competitor, such as the complainant; and, therefore, instructs the witness not to answer.

A. Under instruction of counsel, I decline to answer.

63 X Q. Can and will you refresh your memory and answer X Q. 61?

Defendant's counsel makes the same objection and instructions to the witness as to the last preceding question.

A. Under instruction of counsel, I decline to answer.

358 64 X Q. In the coatings of vessels with Rahtjen's composition, as a general rule, how many coats of paint do you apply, or what is the average amount of coating given to vessels when they are docked for the purpose?

Objected to as immaterial and irrelevant.

A. As a rule one coat of anti-corrosive; and one coat of anti-fouling, from keel to light water mark. Sometimes only one touch-up with anti-corrosive or No. 1; and one full coat of anti-fouling; sometimes, when a ship is very bad and rusty on the bottom, two coats of anti-corrosive may be applied and one coat of anti-fouling.

65 X Q. In your judgment, would the average amount used in the usual course of such business exceed two full coats, one of anti-corrosive and one of anti-fouling?

Same objection.

A. A fair average.

66 X Q. I suppose on an average also there is somewhat more of anti-fouling used than of anti-corrosive?

Same objection.

A. My experience is that the two compositions, the anti-corrosive and the anti-fouling, in most cases with us, average fairly evenly. But at times more may be used of No. 1 according to the surface you are covering and the condition of things.

67 X Q. Of which composition, anti-corrosive or anti-fouling, has the defendant company sold the greater amount of since you have become acquainted with the business?

Same objection.

A. I should say that the anti-corrosive and the anti-fouling average very evenly.

359 68 X Q. State the average amount of surface that a gallon of your Rahtjen's anti-corrosive and a gallon of your Rahtjen's anti-fouling compositions covers when applied to vessels in the ordinary way?

Same objection as the last, and, furthermore, as not proper cross-examination.

A. I do not consider myself an expert on that point inasmuch as

I have never taken a brush and a full gallon of priming and a full gallon of anti-fouling and personally applied it to any surface.

69 X Q. But you claim to have sold Rahtjen's compositions to fill orders, and therefore must know how many gallons you have sold or your workmen have applied to certain vessels; is that not so?

Same objection as last.

A. I know that I have sold Rahtjen's paint and I know that our workmen have applied our Rahtjen's paint to bottoms of vessels, but I claim on account of my expert knowledge of these affairs that no man painting the bottom of a vessel can say to the certainty which Mr. Merwin seems to wish to have me pronounce, before a job is completely finished. For this reason, I cannot answer Mr. Merwin's question.

70 X Q. How many gallons of composition were included in the bill letter-press copy of which you have introduced in evidence for painting the "Star of the East," May 3, 1890?

Same objection.

A. Inasmuch as I myself was not with John A. Donald & Company in 1890, I myself do not know how many gallons of paint were used on that ship.

71 X Q. Do you know how many gallons of Rahtjen's compositions were used either by Donald & Company or the defendant company upon any vessel for which the same was furnished from 1889 to 1899?

Same objection.

360 A. I never measured out the paint myself.

72 X Q. And yet in your answer to X Q. 69 you speak of your expert knowledge of these affairs, and in answer to X Q. 53 you said that "to gather for myself as much and as thorough in-"formation about John A. Donald & Company's previous business "was to copy or gather, in my own handwriting, statements showing "what he had remitted to Holzapfel's in England for the purchase "of Rahtjen's composition," and in answer to X Q. 55, which question called for your knowledge or the means of information from which you stated the amount of sales of Rahtjen's compositions from 1894 to 1898, that "I have gathered this information, to the best of "my knowledge, from statements which I made out myself concern-"ing these questions." In view of these various statements which you have made I ask you again, Do you know the amount of Rahtjen's compositions which have been sold for or used by John A. Donald & Company, or the defendant company, on any vessel whatsoever?

Same objection.

A. I can only repeat my first answer or answers.

73 X Q. Have you ever taken or filled any order for painting any vessel with Rahtjen's compositions between 1891 and 1899?

A. Yes, I have.

74 X Q. Name one.

A. If you will allow me to refresh my memory by looking at my books I think I shall be able to mention one.

75 X Q. If you referred to the defendant company's books, cannot you refresh your memory so as to answer X Q.'s 68, 70, 71 and 72?

Defendant's counsel objects to the question so far as the same relates to the matters inquired about in X Q.'s 68, 70, 71 and 72, on the ground stated in the objections to those questions.

A. No, I could not.

361 76 X Q. Cross-question 58 and your answer to the same are as follows: "Did you yourself make the sales, or make the "original entries of the sales in the books of account of the com-"pany? A. In great many cases I personally made the sales, and "I can say in almost every instance, since 1894, I have made the en-"tries." In view of your answer above quoted I ask you if you can determine from the defendant company's books how much Rahtjen's compositions were furnished by it for any vessels whatsoever?

Same objection.

A. As Mr. Mervin evidently wishes me to be exact and I have never measured out the paint myself, I cannot say that I can.

77 X Q. During the time you have been connected with the defendant company which brand of compositions has that company sold the larger amount of, International or Rahtjen's?

Objected to as immaterial, irrelevant and incompetent.

A. To the best of my knowledge, I can state that the two brands of compositions referred to have all through averaged very evenly.

78 X Q. Do you know or can you determine from the defendant company's books how many gallons of International compositions it sold in the year 1897?

Objected to as clearly immaterial, irrelevant and incompetent and foreign to the issue, and as inquiring about the private business of the company in no way involved in this suit, and the witness is instructed not to answer.

A. Under advice of counsel I decline to answer.

79 X Q. Do you know or can you learn from the defend-
362 ant company's books how many gallons of Rahtjen's compositions it sold in the United States in 1897?

Defendant's counsel objects to the question as immaterial and irrelevant at the present state of the case, being material and relevant only in the event of an accounting which is prayed for in the bill, and instructs the witness not to answer.

A. On advice of counsel I decline to answer.

80 X Q. In speaking of the sales of Rahtjen's compositions by defendant company, how many gallons of the compositions are represented by $1,000 of business?

Same objection as the last, and furthermore, on the ground that

it pertains to the private business of the company, and would enable the complainant, a competitor of the defendant, to compute prices and profits; and the witness is instructed not to answer.

A. On advice of counsel I decline to answer.

81 X Q. Since you have been connected with the defendant company, has it, in the selling and the offering for sale of compositions for ships' bottoms, ever recommended one brand as superior to another, and, if so, state when and the names of the brand.

Defendant's counsel objects to the question on the ground that it involves brands other than the one in issue, and, to that extent, inquiring about the private business of the company in no way involved in this suit, and therefore clearly immaterial, irrelevant, and incompetent; and the witness is instructed not to answer.

A. On advice of counsel I decline to answer.

82 X Q. Has the defendant company ever, to your knowledge, advertised or recommended the International composition as superior to the Rahtjen's compositions?

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Same objection, and, furthermore, as not proper cross-examination, and the witness is instructed not to answer.

A. On advice of counsel, I decline to answer.

83 X Q. Which brand, International or Rahtjen's, is the defendant company selling or using the larger amount of at present?

Same objection and instruction to the witness.

A. On advice of counsel I decline to answer.

84 X Q. Of the $45,000 business in 1898, representing the sales of Rahtjen's compositions by the defendant company, how much pertains to U. S. Navy Department contracts?

Defendant's counsel objects to the question on the ground that it relates to the private business of the company; that the quantity of composition called for under the Government contracts is a matter of record, and is well known to the complainant company, as it was a competitive bidder; and that to inform complainant of the amount defendant received as successful bidder of said contract would be improper and tend to show the profits which the defendant company made, and which, at this stage of the case, is wholly irrelevant, immaterial and incompetent, and the witness is instructed not to answer.

A. On advice of counsel I decline to answer.

85 X Q. How many vessels were coated with the defendant company's Rahtjen's compositions in 1897 in the United States?

A. I have not the statistics by me here to answer such a question; but, allowing me time to travel over the United States to gather the number, I shall be very glad to furnish Mr. Merwin with such data.

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86 X Q. Can you, by reference to books of the defendant company, refresh your memory so as to answer the previous question?

A. That cannot be done.

87 X Q. Are there not books and other documents belonging to and in possession of the defendant company in New York city from which this information can be obtained?

A. Not to my knowledge.

88 X Q. Do you swear that you do not know, and have no means of learning what and how many vessels were coated with the defendant company's Rahtjen's compositions in the United States in 1897?

A. I do, as far as Holzapfel's Rahtjen's compositions is concerned.

89 X Q. Does not all of Holzapfel's Rahtjen's compositions which are sold in the United States pass through the office of the defendant company in New York city, and record of the same appear upon its books of account?

A. Yes, the record of the same passes through the office, but not the paint.

90 X Q. Do not the defendant company's books of account show to what vessels the Rahtjen's compositions which it sells are furnished, when such sales are made to owners, officers, or agents of such vessels?

A. Yes.

91 X Q. Do you know or can you determine from said books what vessels the defendant company furnished Rahtjen's compositions for in the years 1897 and 1898 in the United States?

A. No, I cannot.

92 X Q. Why not?

A. Because the record that I know of, or the books that I know of, and have previously referred to, do not contain the names of all the vessels coated in the United States with Holzapfel's Rahtjen's compositions.

93 X Q. In what cases was such record omitted or lacking?

A. Every port outside of the port of New York.

94 X Q. What proportion of the total amount of Rahtjen's
365 compositions sold by the defendant company in the United States in the year 1897 was for ports other than New York?

A. I don't know; I have never tried to determine.

95 X Q. You can determine that, can you not, from the company's books?

A. Yes, I dare say that could be determined, but it will involve time to have this figured out.

96 X Q. Will you please refer to the company's books and collate therefrom what proportion of the total sales of Rahtjen's compositions made by it in the years 1897 and 1898 respectively was for ports outside of New York, and testify as to the fact at a future hearing in this case.

A. I will endeavor to do so if so advised by my counsel.

97 X Q. What vessels to your knowledge, as shown by the books of the defendant company in New York city, were coated with Rahtjen's compositions, Holzapfel's manufacture, in the year 1897, in the first six months of 1898, and in the last six months of 1898, respectively, and, if you cannot state at this moment from your per-

sonal knowledge, will you obtain it from the books and present it at the next hearing of this case?

A. I will endeavor to do so if so advised by my counsel.

98 X Q. What boats of the Anchor line are now coated with Rahtjen's compositions, Holzapfel's manufacture?

A. I couldn't tell you.

99 X Q. What boats of that line has defendant company furnished Rahtjen's compositions for since January 1st, 1898?

A. I don't know; inasmuch as the boats referred to early in my examination as having been coated with Rahtjen's compositions for Henderson Bros. did at that time actually belong to the Anchor line, or were chartered by them.

100 X Q. Has the defendant company sold any Rahtjen's compositions to Henderson & Company since January 1st, 1898?

A. I don't know at the present moment, but maybe my memory on this point could be refreshed if I was given time to refer to the books.

366 101 X Q. Why, if you do not know the fact, did you in your direct examination name among the present customers of the defendant company Henderson & Company, agents for the Anchor line?

A. Because, as previously stated in my examination, I found in the year 1891, when I joined John A. Donald & Company, by referring to their firm books previous to the year I have just mentioned, that certain vessels, the names of which were then mentioned, were found in the books as having been coated with Holzapfel's Rahtjen's compositions.

102 X Q. Then you do not know whether the Anchor line, Henderson Bros., or Henderson & Company are customers of the defendant company or not at present?

A. We consider ourselves their customers, in this way, that if at Henderson Bros.' office here in New York, there should happen to be a captain, either of one of their own steamers or chartered steamers, requiring to have a vessel dry-docked and painted, they have invariably asked our quotations. Or, if they have inquiries as to the cost of docking and painting certain vessels which may possibly come here to their care, they may also have asked us to send them quotations.

103 X Q. Are R. W. Cameron & Company present customers of the defendant company?

A. They are.

104 X Q. What does the defendant company sell them, International or Rahtjen's compositions?

A. Sometimes International and sometimes Rahtjen's.

105 X Q. In what proportion?

Objected to on the same ground as objection to cross-question 83.

A. Half and half is a happy medium.

106 X Q. Have you sold them any Rahtjen's compositions in the last year and a half?

A. I can't say without referring to my books.

107 X Q. Will you refer to your books and answer the question at the next hearing in this case, giving also the names of the
367 vessels for which it was furnished?

A. I will endeavor to do so, if so advised by my counsel.

108 X Q. Are W. R. Grace & Company present customers of the defendant company?

A. They are.

109 X Q. Are they customers for International as well as Rahtjen's compositions?

A. Sometimes we paint their ships with one brand and sometimes with another.

110 X Q. Are Bennet, Walsh & Co. present customers of the defendant company?

A. I don't know that the firm of Bennet, Walsh & Co. require or have required any Rahtjen's compositions, so if for this reason you should not deem them a customer I have nothing to say; but we have coated a number of vessels from time to time which have been in to them as agents, with our Rahtjen's compositions.

111 X Q. What vessels of the American line of steamers have been coated with the defendant company's Rahtjen's compositions within the last year and a half?

A. I shall be better able to answer this question by referring to my books.

112 X Q. Will you do so and then answer the question?

A. I will endeavor to do so if so advised by my counsel.

113 X Q. Did the defendant company ever sell any of Rahtjen's compositions to the U. S. Navy Department prior to 1898?

A. As far as I know, not here in in New York.

114 X Q. Anywhere in the United States, to your knowledge?

A. Not so far as I know.

115 X Q. Has not the defendant company, prior to 1898 advertised and recommended its International brand of compositions in preference to Rahtjen's compositions and endeavored to secure the use of the International compositions instead of Rahtjen's, so far as that could be done?

Objected to on the ground that the inquiry relates to the conduct of defendant's business in relation to its International com-
368 position, which is foreign to the issue in this case and, therefore, immaterial, irrelevant and incompetent and the witness is instructed not to answer.

A. As instructed by my counsel, I decline to answer.

116 X Q. During the time you have been connected with John A. Donald & Co. and the defendant company prior to 1898, has either of said parties ever advertised recommended or endeavored to sell Rahtjen's compositions in preference to International composition?

Same objection and instruction.

A. As instructed by my counsel, I decline to answer.

117 X Q. Has the defendant company, to your knowledge, ever sold any composition for ships' bottoms as and for Rahtjen's compo-

sitions, except such as was compounded in accordance with the formulæ of the British patent to Heinrich Rahtjen, No. 3320, dated November 29, 1873?

A. I don't know.

118 X Q. Is it not the fact that since you have been connected with the defendant company it has always given special prominence to International and other brands of its compositions and paints as contrasted with Rahtjen's compositions, and that it has sold and used and is now selling and using more of the International composition than of Rahtjen's compositions to and for its customers, other than the United States Government?

Same objection and instruction as to cross-question 115.

A. As instructed by my counsel, I decline to answer.

Adjourned by consent to Tuesday, June 20th, at 10.30.

369 JUNE 20, 1899.

Adjourned by consent to Wednesday, June 21, 1899, at 11 o'clock.

JUNE 21, 1899.

Met pursuant to adjournment.

Present: Counsel as before, and also Mr. Kerr.

Cross-examination continued:

119 X Q. Are you prepared to, and will you now, answer question X Q. 111?

A. The steamship "St. Paul" of the American line was painted at Newport News, Va., in the month of February, 1898; all arrangements for the contract having been made through the New York office.

120 X Q. Do you know of your own knowledge what compositions was applied to the "St. Paul" at the date you mention, and, if so, how do you know the fact?

A. The paint required to be applied on the bottom of the steamship "St. Paul" on the occasion referred to I know of my personal knowledge was shipped from our factory here at New York to Newport News, and our agent at Newport News reported that said paint was applied, giving us in return regular report mentioning the factory numbers of our Rahtjen's paint which was applied to said steamer, thus I have arrived at the conclusion that the paint that was shipped from here was applied to the bottom of the "St. Paul."

121 X Q. What brand of compositions was on the bottom of the "St. Paul" at the time you speak of having had her coated with the defendant's Rahtjen's compositions?

Objected to as immaterial and irrelevant.

A. I don't know whether she had any composition on her bottom or not, or that any was left of what she previously might have been coated with.

370 122 X Q. Do you know by whom she had been last previously coated?

Objected to as immaterial and irrelevant.

A. I do not.

123 X Q. Who gave the defendant company the order for the compositions which were applied to the "St. Paul" at the date you mention?

Same objection.

A. I do not remember at this moment.

124 X Q. Do not your books show who gave the order?

Same objection.

A. Very likely they will.

125 X Q. To whom were the compositions charged?

A. As far as I can remember, to the International Navigation Company.

126 X Q. Don't you know?

A. The books will tell.

127 X Q. I insist upon the question being answered.

A. I don't remember at this moment, but my memory could be refreshed by looking at the books, and then I could give positive information.

128 X Q. How did the order come to the defendant company for these compositions; was it by written order or by personal application of some one representing the owners of the vessel applying at this office?

Objected to as immaterial and irrelevant.

A. I don't remember at this moment, but the books will tell.

129 X Q. What do you mean, then, in answer to question X Q. 119, when you said: "All arrangements for the contract having been made through the New York office"?

A. What I mean by that is that my recollection of the
371 occurrence is that we had correspondence with the International Navigation Company about the matter.

130 X Q. Who conducted the correspondence on the part of the defendant company?

A. I couldn't tell you.

131 X Q. Did you personally take any part in the negotiations or correspondence in regard to this contract?

A. I may have.

132 X Q. Don't you know?

A. I don't recollect at this moment; the books will show whether I did or not.

133 X Q. Please produce all correspondence relating to the contract in question, the order received by you for the same, the copy of the bill for the goods, and all other documents pertaining to the contract in the possession of the defendant company.

Defendant's counsel instructs the witness that if any of the documents or papers called for divulge or disclose what may be termed trade secrets, which it would be prejudicial to make known to a com-

petitor such as the complainant company, he can refuse to answer on those grounds, producing, however, any other papers which relate to the transaction, but do not disclose such trade secrets.

A. I will look over these papers and answer your question before closing my examination.

134 X Q. Are you prepared to and will you now answer X Q. 96?

A. Yes, I will. The proportion in 1897 was as 1, representing the port of New York, to 3¾ representing ports in the United States outside of New York; and in 1898 the proportion was as 1 to 1.

135 X Q. What was the total number of gallons of Rahtjen's compositions sold by the defendant company in the United States in 1897?

A. I don't know.

136 X Q. Do you swear that you, having under oath stated that the books of the defendant company are in your charge, and that record of all of Holzapfel's Rahtjen's compositions which are sold in the United States passes through this office, and having just
372 computed the proportion of such sales for the year 1897, as between the port of New York and all outside ports, you cannot tell how many gallons of these compositions were sold by the defendant company in the United States in the year 1897?

A. I do.

137 X Q. How could you determine the proportion of the sales as between the port of New York and all other ports in the United States without knowing the total sales?

A. The figures I have had before me represent gross receipts of transactions, and the proportions referred are worked out from said figures.

138 X Q. What do you mean by transactions?

A. Painting of ships, and selling Rahtjen's paint of our manufacture to outports.

139 X Q. Did you then in the gross sums stated by you in your direct examination as representing the sales of the defendant's Rahtjen's compositions, include the amount of these "transactions," as you now call them?

A. Yes.

140 X Q. Then the sums which you give in your answer to question 22 of the volume of business of John A. Donald & Co. and of the defendant company, in the years named, are not those of the sales of Rahtjen's compositions, but of other business also?

A. No. The figures that I gave in my direct examination all appertain to the sale and gross receipts of sales of Rahtjen's compositions of our manufacture.

141 X Q. Do not the books of the defendant company show how many gallons of Rahtjen's compositions were sold by it in the United States in 1897 or any other given period?

A. No; they do not.

142 X Q. Do not the defendant company's books show how many gallons of Rahtjen's compositions of its manufacture were shipped or

imported to the United States during the year 1897 or any other given period?

A. No; they do not. Not our New York books.

143 X Q. What do you mean then by your answer to X Q. 54, which is as follows: "Because I have copied or have seen
373 "copies in the books of John A. Donald & Company giving "similar statements to Holzapfel's Compositions Company in "England, for the amount of Rahtjen's paint purchased." And your answer to X Q. 55, which is: "I have gathered this information to "the best of my knowledge, from statements which I made out my- "self concerning these questions."

A. As far as John A. Donald & Company's business is concerned I gathered such information from Mr. Donald's statements, and as far as Holzapfel's Company's business is concerned since 1894, I gathered it, as I previously mentioned, from statements which I got out myself. As to how Mr. Donald computed or upon which basis he computed his statements I cannot tell you. As to my own statements, they were based upon gross receipts of the business here in New York.

144 X Q. Is there no record anywhere in the books of the defendant company of the number of gallons of paint imported into this country of Rahtjen's compositions, or of the number of gallons accounted for by the New York office for or during the year 1897 or any other given period?

A. No, there is not.

145 X Q. Were not the sales of Rahtjen's compositions by the defendant company in England to John A. Donald & Co. of specified amounts or quantities of the compositions upon a certain scale of prices?

A. I couldn't tell you.

146 X Q. And yet you have been in charge of the books of John A. Donald & Co. and of the defendant company in its New York office since 1894, for the period from 1891 to the present time, and cannot answer this question?

A. Your question, X Q. 145, only refers to John A. Donald & Company.

147 X Q. Is there any record in the books of the defendant company of the amount or quantity of Rahtjen's compositions manufactured by it in this country?

A. I have not got such record.

148 X Q. (Question repeated.)

A. I don't know that there is any such record; I have not got it.

149 X Q. Has the defendant company any means of know-
374 ing or determining, or does it know or has it determined, or has any one for it determined, the amount of Rahtjen's compositions which it has either manufactured in the United States, or imported into the United States, or sold or had sold for it in the United States, for or during any period of time?

Defendant's counsel objects to this question and all similar questions on this line of examination, unless the inquiry is limited to

the books or book-keeping in the New York office of the defendant, or matters within the personal knowledge of the witness.

A. In the many questions put to me upon this point I have in every instance tried honestly, squarely and truthfully to tell and to give the information I possess to throw light upon these subjects, and I cannot say any more. I must answer the question I don't know.

150 X Q. Is there any one connected with the defendant company in the United States who can give this information; if so, who?

A. I couldn't tell, as I don't know.

151 X Q. Do you now know and will you tell what boats of the Anchor line of steamers are now coated with Rahtjen's composition, Holzapfel's manufacture?

A. I don't know which are and which are not.

152 X Q. What vessels to your knowledge, or shown by the books of the defendant company in New York city, were coated with Rahtjen's compositions, Holzapfel's manufacture in the year 1897?

A. If I was to give the names of vessels coated in 1897 with our Rahtjen's composition I would be divulging business secrets which may be useful to our opponent, the complainant company, or to Mr. Otto L. Petersen, its president; and for this reason I refuse to answer the question.

153 X Q. Give me the number of such vessels that you know of, or that the books show, to have been thus coated in the year 1897?

375 A. For the same reason as given in my previous answer I refuse to answer the question; but I have no objection for the same reason to give the dates of sale as also names of parties to whom sales were made in 1897.

154 X Q. Will you give the quantity of compositions covered by these sales also?

A. I don't know the quantities.

155 X Q. Will you give the prices at which the compositions were sold in these instances?

A. I don't know the prices at which the compositions were sold in these instances, but I know the gross amount obtained.

156 X Q. Will you give any information in respect to those sales which will enable the court to determine the quantity sold, or to assist in verifying or disproving your original statement of the amount of sales for that year?

A. I am trying my best all the time to assist you in determining what you are after, but I don't know anything about the quantities.

157 X Q. Don't you know or somebody connected with the defendant company how much paint is used in any case where you paint a vessel?

A. I can only answer for myself and I don't know.

158 X Q. Is there no record kept by the defendant company, or no report made by any one to it, of the quantity of compositions used by it in coating a vessel?

A. Yes.

159 X Q. What is the record?

A. The record is a pamphlet blank which is filled in and written out by anybody who may attend the painting of a vessel, and such report is then sent to England.

160 X Q. Is no record of it kept here?

A. It is copied here in New York.

161 X Q. What do the copies of these reports last mentioned show as to the quantities of Rahtjen's compositions used in the painting of vessels by the defendant company in the United States for the year 1897?

A. They show the weight of compositions consumed.

162 X Q. Not the volume or quantity?

A. I don't exactly understand that question.

376 163 X Q. Don't you know the meanings of the words "volume" and "quantity" applied to paints?

A. I can only speak for myself; and, as stated, our reports above referred to give the weight.

164 X Q. How many pounds do these reports show that the defendant company used of its Rahtjen's composition in the painting of vessels in the United States in the year 1897?

A. At the present moment I am unable to determine how much.

165 X Q. Will you examine the records and state that amount before the close of your examination?

A. I will certainly do so, and with pleasure, if given the necessary time. To do so, however, may involve a matter of three or four days, or five or six days—I cannot say exactly how many—before I get at the work.

166 X Q. In what are the reports in question copied?

A. In a regular report book kept for that purpose.

167 X Q. How many of these report books were used for that purpose in the year 1897?

A. I don't know; I will have to determine.

168 X Q. State as nearly as you can estimate.

A. It may be one, it may be two.

169 X Q. How many pages have these books, approximately?

A. From 400 to 600 pages.

170 X Q. And, to examine one or two record books of this size, you say it may take you possibly five or six days; is that correct?

A. I have said five or six days, with the only intent of not giving myself too little time for this purpose, so that I afterwards should have to beg and beg for postponements and thereby delay matters. If it is requested of me to examine these books I'll promise to give the case the utmost dispatch I know of.

171 X Q. Are there no reports or memoranda of any character to which you can refer to determine the number of pounds of Rahtjen's compositions which were disposed of by or for the defendant company in the United States in the year 1897, in addition to these reports as to vessels which have actually been painted by the defendant company?

377 A. No, there is not; not when the question refers to ships painted in the United States.

172 X Q. How can the defendant company then determine what

becomes of the Rahtjen's compositions record of which you have already said is kept in this office, and which are disposed of in other ways than by painting of vessels by its own employees?

A. Record of Rahtjen's composition disposed of outside of the port of New York is recorded in another book.

173 X Q. Then why can you not tell, by reference to that book, how many pounds of Rahtjen's compositions were so disposed of by the defendant in the United States in 1897?

A. I am unaware of having said or testified to that I could not determine how many pounds of Rahtjen's compositions were supplied outside of New York. I understood Mr. Merwin's former question on this point to allude to ships painted with said composition in the United States. I beg to remark that I can determine from the book in reference how many pounds we shipped during the year of 1897 to ports in the United States outside of the port of New York, and I am willing to give this information whenever it is desired and as quickly as I can gather all the data bearing upon this point. In regard to the time it would take me to compound these statistics I beg that leniency be shown to me on this point, as I cannot say at the present moment exactly how long a time it will take me, but I will promise to give the matter dispatch.

174 X Q. You will please, therefore, refer to these books which have been testified to last and produce them for purposes of verification, and state how many pounds of Rahtjen's compositions the defendant company itself used in the United States in the painting of vessels in the year 1897, in the first six months of 1898 and the last six months of 1898, and also for the same respective periods how many pounds of Rahtjen's compositions the defendant company has sold in the United States for use outside of the port of New
378 York, at the same time specifying as far as the records show the names of parties to whom sold or supplied under contract and the names of vessels upon which used.

Defendant's counsel objects to so much of the preceding question as calls for the production of the books themselves for verification, and as calls for the names of vessels painted with the Rahtjen's composition, on the ground that the entries in such books or the furnishing of such data might disclose trade secrets prejudicial to the defendant, and instructs the witness, if such records or such data called for would disclose such trade secrets, he is at liberty to refuse to produce or furnish the same. This instruction does not apply to so much of the question as calls for the number of pounds of defendant's Rahtjen's compositions used in the United States during the period inquired about, whether sold or used in the painting of vessels.

A. I will do so, if so instructed by my counsel.

175 X Q. How much does a gallon of the defendant's Rahtjen's composition No. 1 weigh?

A. I have not the slightest idea.

176 X Q. How much does the defendant's Rahtjen's composition No. 3 weigh per gallon?

A. I don't know.

177 X Q. Are these compositions bought or sold by the defendant company by the pound or by the gallon, or by weight or by measure?

A. I think a correct answer would be by weight.

178 X Q. Don't you know?

A. I can only answer for myself, and the above is my answer.

179 X Q. How has the United States Government bought Rahtjen's compositions of the defendant company, by weight or by measure?

A. I don't know. I have had nothing to do with the com-
379 pany's dealing with the Government for the supply of our Rahtjen's paint.

180 X Q. Doesn't this appear upon the books of the company which are in your charge?

A. It could be determined. Yes; with how many pounds our Rahtjen's composition the Government has been supplied. At least, I think so.

181 X Q. Does the defendant company sell its Rahtjen's compositions to the United States Government at the same prices that it charges private customers for the same?

Defendant's counsel objects to the question as not material or relevant to the issue in this case, and as inquiring about trade secrets, information in regard to which the complainant is not entitled to receive, and instructs the witness not to answer.

A. As instructed by counsel, I decline to answer.

182 X Q. Have you refreshed your memory, and can and will you now state whether the defendant company has sold any of its Rahtjen's compositions to Henderson & Company since January 1st, 1898, and, if so, when, and in what amounts and for what vessels, respectively?

A. Here in New York we have not sold Henderson & Company any Rahtjen's compositions in the period referred to as far as I know. I have previously, in my testimony, mentioned why I have considered Henderson & Company, or Henderson Bros., the customers of John A. Donald & Company or Holzapfel's Compositions Company.

183 X Q. How many pounds of Rahtjen's compositions has the defendant company manufactured in the United States?

Objected to by defendant's counsel as immaterial, irrelevant, and improper on the ground that, the suit being for infringement
380 of a trade-mark, it is immaterial whether this composition is made here or abroad; the sale of the alleged infringement being admitted, the place of the manufacture is wholly immaterial in this suit. Furthermore, the question is objected to as not proper cross-examination, and the witness is instructed not to answer.

A. As instructed by counsel, I decline to answer.

184 X Q. When did the defendant company commence manufacturing Rahtjen's compositions in this country?

Same objection and instruction to witness.

A. As instructed by counsel, I decline to answer.

185 X Q. Does it manufacture in this country International composition?

Objected to by defendant's counsel as wholly immaterial, irrelevant and improper and foreign to the issues in this suit, and the witness is instructed not to answer.

A. As instructed by counsel, I decline to answer.

186 X Q. Have you refreshed your memory, and can and will you state how much Rahtjen's composition the defendant company has sold R. W. Cameron & Co. in the last year and a half, and the names of the vessels for which it was furnished, together with the dates and amounts for the respective vessels?

Defendant's counsel instructs the witness that if the data called for discloses trade secrets he may refuse to give such data on this ground.

A. R. W. Cameron & Company have, as far as I know, not had any vessels here in the last year and a half, painting in New York.

187 X Q. Have you refreshed your memory, and can and will you state whether the defendant company has sold to W. R. Grace
381 & Company any of its Rahtjen's compositions in the last year and a half, and, if so, how much and for what vessels, and in what amounts for such vessels, respectively?

Same instruction to witness as last.

A. I have found that on August the 13th, 1898, we painted one of W. R. Grace & Company's steamers with our Rahtjen's composition; also on December the 23d of the same year; but I shall not divulge the name of the steamers, inasmuch as I thereby would be giving away a business secret to an opponent.

188 X Q. What was the amount of Rahtjen's compositions used in the painting of these two vessels?

Same instruction to witness as last.

A. I refuse to answer this question as appertaining to giving away business secrets.

189 X Q. How many and what vessels of the U. S. Government have been painted with the defendant's Rahtjen's compositions during the years 1898 and 1899?

Same instruction as last.

A. I refuse to answer this question.

190 X Q. During the last year and a half how much International composition has defendant company sold to W. R. Grace & Co., and for what vessels?

Objected to by defendant's counsel as immaterial, irrelevant and incompetent, and as inquiring about a composition which is not the

subject of this suit or involved therein, and the witness is instructed not to answer.

A. As instructed by counsel I decline to answer.

191 X Q. I ask the same question in regard to R. W. Cameron & Co.

Same objections and instruction.

382 A. As instructed by counsel I decline to answer.

192 X Q. Has the defendant company during the past year and a half sold any International composition for use upon any vessels of the Anchor and American lines, and if so, what vessels?

Same objection and instruction.

A. As instructed by counsel I decline to answer.

Redirect examination by Mr. McMaster:

193 Re-D. Q. Do you know what books or entries are kept by the defendant company in England?

Objected to as irrelevant, incompetent and immaterial.

A. No, I do not.

194 Re-D. Q. Your testimony in relation to the defendant's books and its book-keeping has reference to what only?

A. Only to the books kept in the New York office.

195 Re-D. Q. You refer in answer to X Q. 187 to Grace & Company's steamers painted with your Rahtjen's compositions on August 13 and December 23, 1898. Was there more than one vessel of Grace & Company painted by defendant corporation on either of those dates?

A. No.

Adjourned by consent to June 22d, at 11 o'clock.

JUNE 22, 1899.

Adjourned by consent to June 26th, at 11 a. m.

383 JUNE 26, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Re-D. Q. 196. In X Q. 134 you were asked, and in your answer you gave the proportions of the gross amount of sales for the years 1897 and '98, which represented the Holzapfel's Rahtjen's compositions used in the port of New York and that sent to other ports in the United States. Can you give the like proportion for the other years which you have been in Donald & Co.'s employ or the defendant company's employ?

A. The proportion, as mentioned previously in my testimony, was given without my then definitely stating the gross amount in money. I will state the proportions now in the same manner for the following years: The period covering the last four months of 1891 the proportions were as follows: The New York business then in our

Rahtjen's compositions was 3.17 more than the outports. For the year '92, 1.80 times the outports. 1893, 5.75 times the outports. 1894, 3.40 times the outports. 1895, .42 times the outports. 1896, 1.10 times the outports.

197 Re-D. Q. These proportions that you have given from some time in '91 to the year 1898 cover what period?

A. The period of my employment by Donald & Company and Holzapfel's Compositions Company.

198 Re-D. Q. And during that period did you have much knowledge or familiarity with the business done in Holzapfel's Rahtjen's compositions?

A. I can state from the period that I have mentioned, September, '91, up to the present time, I have been entirely familiar as to the output or the sales we have made here in New York or the outports.

199 Re-D. Q. What is and has been the custom, if you know, in regard to docking and painting the large passenger steamers of the ocean lines? Are they painted in this country or abroad?

A. The invariable custom has been that such steamers as
384 referred to do not dry-dock and paint in New York, unless absolutely compelled to do so by some transaction. Almost I can say, when you take a comparison of docking these steamers here in America and docking them in Europe, it may be safely said that such work is done on the other side entirely, the proportion of dockings here being so few that they are hardly worth while mentioning; even the American line of steamers have most of their docking done in Europe.

Recross-examination by Mr. MERWIN:

200 Re-X Q. Are you prepared to and will you now answer X Q. 133 which is to the effect that you produce all correspondence relating to the contract for painting the steamship "St. Paul" in February, 1898, the order received for the same, the copy of the bill rendered by you, and all other documents relating to the contract in the possession of the defendant company?

Defendant's counsel renews instructions to witness given at X Q. 133.

A. I cannot give you all the data that you have asked for, inasmuch if I did, you would be conversant, or our opponent would be conversant, with the price we obtained, and, as the gross tonnage of the "St. Paul" could easily be gotten from Lloyd's register, our opponent could easily compound from such figures the net profit, comparatively speaking, we had obtained on the transaction; but I hold in my hand at present a letter from the American line, or the International Navigation Company, dated 305 and 307 Walnut street, Philadelphia, December 27, 1897, and addressed to Mr. John A. Donald, whereby they award the contract to the defendant company, to supply the necessary amount of their genuine Rahtjen's
385 composition to paint their steamship "St. Paul" with one coat of anti-corrosive and one coat of anti-fouling.

Complainant's counsel interrupts witness to object to reading partial statements from papers which are not produced and put in evidence.

201 Re-X Q. I now ask you, have you all the documents called for in the question referred to, and will you produce them?

A. I have not, as I was advised by the defendant's counsel not to produce such data if said correspondence and letters from the American line concerning this order given us should lead to give away business secrets to opponent, and I may remark here that in looking over the correspondence referring to this matter, I have found most letters referred to the price we were to obtain, and for this reason I cannot produce these documents here now, unless you allow me to erase from such correspondence and documents all information appertaining to give away any business secret embodied in this transaction that would benefit my opponent.

202 Re-X Q. Are you prepared to and will you now answer X Q. 174, which is in substance to produce your books and records which show how many pounds of Rahtjen's composition the defendant itself used in the United States in the painting of vessels in 1897, first six months of 1898, and last six months of 1898; also for the same period how many pounds were sold in the United States for use outside of the port of New York, the names of the parties to whom sold, and the names of the vessels upon which used?

Defendant's counsel repeats the same objection to question and instruction to witness, as to X Q. 174.

A. I cannot give you all the data you ask for, as to names of owners and ships, etc., etc., inasmuch as if I did, tonnage could be looked up and the company's net profit compounded; but I have no
386 objection to giving in pounds the total output. I cannot produce the defendant's books for verification for the same reason.

ELLIOT I. G. ANDERSEN.

Sworn to before, &c.

BENJAMIN BARKER, *Examiner.*

Defendant's counsel having stated that the deposition of the witness, Anderson, is closed, complainant's counsel gives notice that upon the hearing in this cause he will move the court to strike from the record so much of said deposition as relates to the volume of business alleged by him to have been transacted by John A. Donald & Co., and the defendant company, from the year 1889 to the present time, in the sale of paints under the name of "Rahtjen's compositions" manufactured by the defendant company, for the reasons heretofore given upon the record, *i. e.*, incompetency, immateriality and irrelevancy, and further, because said witness either of his own motion or under instructions from defendant's counsel has evaded or refused to answer proper and pertinent questions in cross-examination (attention being specifically called to such evasion or refusal respecting answers to the following questions: X Q. 60–63, incl.; 68–72, 75, 76, 78–84, 115, 116, 118, 149, 150, 152, 153, 156, 167, 181, 183,

184, 185, 187–192 and Re-X Q. 200, 201 and 202,) which answers would have tested the accuracy of said witness' statements in direct examination as to the volume and the publicity of defendant's sales of goods under the name of "Rahtjen's compositions," and the actual or implied knowledge of complainant company thereof; and because by this course of witness and defendant's counsel the right to cross-examine said witness has been practically denied, and the complainant deprived of all means of testing the truth and accuracy of said witness' statements. Specifically this motion will be made to strike out the following questions, viz: Q. 22–26 incl.; 30,
387 33–36 incl.; 42, 43, 44 and 47; Re-D. Q. 196 and 198, and the answers thereto.

DOUGLAS COVERLY, being duly sworn and examined, testified as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Douglas Coverly; I am 40 years old, and reside in 834 Jefferson avenue, Brooklyn; I am chief clerk for Henderson Bros.

Q. 2. How long have you been chief clerk for Henderson Bros.?

A. About 15 years.

Q. 3. What is the business of Henderson Bros.?

A. Steamship agents.

Q. 4. State whether or not Henderson Bros. have occasion now and then to dock and paint vessels, which they either own or are consigned to them, or which they charter?

A. Occasionally.

Q. 5. Has that been so during the time you have been in their employ?

A. Yes.

Q. 6. When you have occasion to dock and paint such vessels what is the first thing you do?

A. Get estimates.

Q. 7. Can you give the names of any parties from whom you have sought estimates for such work in the past?

A. From Williams & Co., Mr. Peterson and John A. Donald.

Q. 8. Do you know what kind of paints or compositions for painting the bottom of vessels Donald & Co. or the defendant corporation have sold or used?

A. We have always understood that Mr. Donald sold to us Holzapfel's Rahtjen's composition; Mr. Petersen, Hartmann's Rahtjen's composition.

Q. 9. Do you remember about when you first knew that John A. Donald & Co. were painting or furnishing Holzapfel's Rahtjen's composition for painting the bottoms of vessels?

A. They did some for us in 1889.

Q. 10. Do you remember what vessels they painted with Holzapfel's Rahtjen's composition?

388 A. "Tyrian" and "Sidonia." There is another sailing vessel—the "Wynnstay," I think it was.

Q. 11. Were estimates for the painting of these vessels you have named in 1889 solicited from the parties you have named?

A. Yes; so far as my recollection goes.

Q. 12. That was your custom in all cases?

A. In all cases.

Q. 13. Was there any secret about John A. Donald & Co. selling or furnishing Holzapfel's Rahtjen's composition?

A. Not that I know of.

Q. 14. Was or was not Donald & Co.'s business of selling and furnishing Holzapfel's Rahtjen's composition carried on openly, publicly and notoriously?

Objected to as incompetent, irrelevant and immaterial, unless the witness shall have previously shown means of such general knowledge as to make him competent to answer the question as put.

A. As far as I saw it, it was done openly.

Q. 15. Have you any pecuniary interest in the result of this controversy?

A. No.

Q. 16. Are you a stockholder in or in any way connected with the defendant company?

A. No.

Q. 17. You have attended under a subpœna, have you not, to testify in this case?

A. Yes.

Q. 18. What is the practice or custom in regard to docking and painting the large ocean liners, such as the "City of Rome" and like vessels of the Anchor line; are they docked or painted here, or on the other side?

A. On the other side.

Q. 19. Is that the general practice and custom of the English lines of steamers carrying the passenger travel between here and Europe?

A. Yes.

Cross-examination by Mr. MERWIN:

X Q. 20. Do you know of your own knowledge that you
389 asked for or received estimates from Mr. Petersen in 1889 for painting the vessels which you named, "Tyrian" and "Sidonian"?

A. As far as I can recollect.

X Q. 21. Do you swear that Mr. Petersen furnished you estimates for those vessels in 1889?

A. I do not.

X Q. 22. If Mr. Petersen should state in your presence that he did not furnish any estimates for those vessels in that year, what would be your opinion as to the fact?

A. I would think it strange, as it has been customary in all cases to get estimates from both Rahtjen's agents and also others.

X Q. 23. Do you mean to say that in every case during the last ten years, where your firm has had the business of painting a vessel,

that you have invariably asked for a bid from both Mr. Petersen and Mr. Donald?

A. Invariably.

X Q. 24. Do you know the brand manufactured and sold by the defendant as International composition?

A. We have when receiving estimates for Rahtjen's paint also have had figures on the International?

X Q. 25. Have you ever used International?

A. No, not to my knowledge.

X Q. 26. You spoke of the "City of Rome;" what composition is used on her?

A. I don't know.

X Q. 27. You don't know? It is one of your company's boats, isn't it?

A. It is consigned to us.

X Q. 28. Have you purchased Rahtjen's paint from Mr. Petersen?

A. I think we have had some work done by Mr. Petersen.

X Q. 29. How recently?

A. I forget the dates now.

X Q. 30. Is it not the fact that Mr. Petersen only has furnished Rahtjen's composition to you within the last two years?

A. I can't say that.

X Q. 31. Did you tell Mr. Petersen, in requesting estimates from him in any of these cases, that you had also requested estimates from Mr. Donald for Holzapfel's Rahtjen's composition?

A. No.

DOUGLAS COVERLY.

Sworn to before me, &c.

BENJAMIN BARKER, *Ex'r.*

380 JACOB H. HAFFNER, a witness called on behalf of defendant, being duly sworn, testified as follows:

1 Q. What is your name, age, residence, and occupation?

A. My name is Jacob H. Haffner; I am 30 years old; and I reside in Brooklyn, N. Y., and my occupation is chief clerk for Bowring & Archibald.

2 Q. What is their business?

A. Steamship owners and agents, 17 State street, N. Y.

3 Q. How long have you been in the employ of Bowring & Archibald?

A. Since 1886.

4 Q. State whether or not Bowring & Archibald have occasion at any time to dock and paint vessels which they either own or charter, or which are consigned to them?

A. They have, for those they own and have consigned, but not chartered.

5 Q. And that has been so during all the time of your employment, has it not?

A. Yes, sir.

6 Q. Do you know, or did you know, John A. Donald & Co.?

A. Yes, sir.

7 Q. Do you know what business they carried on?
A. Yes, sir; painting business.
8 Q. Painting what?
A. Ships' bottoms.
9 Q. Do you know what kind of paint or composition they sell or use for painting ships' bottoms?
A. Yes, sir.
10 Q. You may state what?
A. Well, they sell more than one kind. We have had from them their Holzapfel's composition, their Rahtjen's paint, and McInnes' paint, and the green paint, which I suppose is one of the kinds of McInnes' paint.
11 Q. How long have you known that Donald & Co. were selling or using Rahtjen's paint or composition?
A. I don't know exactly how long. I know when I was book-keeper with the firm seeing bills of theirs for Rahtjen's paint.
12 Q. Bills rendered by whom?
A. John A. Donald & Co.
13 Q. How long ago was this?
A. Well, I was book-keeper from '88 to about '95; during that period from time to time.
391 14 Q. Do you mean during that period from time to time you saw bills rendered by John A. Donald & Co. to Bowring & Archibald for painting ships' bottoms with the Rahtjen's composition?
A. Yes, sir.
15 Q. State whether or not you remember that this Rahtjen's paint or composition sold or used by Donald & Co. at the times you referred to was described as any one's manufacture?
A. I don't know just what you mean by "manufacture." All I know, the bills stated Rahtjen's paint, and we understood it to be so.
16 Q. Do you remember whether or not it was described as Holzapfel's Rahtjen's composition or paint?

Objected to as leading.

A. I won't say that I definitely remember. All I know is that it was described as Rahtjen's paint, and I know that Mr. Donald's paint connections are with Mr. Holzapfel, so presume the paint was made in some such way or with some such connection.
17 Q. Do you remember any instance where Donald & Company painted the bottom of a vessel for Bowring & Archibald with said Rahtjen's composition?
A. Yes; in the case of the "Columbia," in 1890.
18 Q. Do you know of anybody else who was selling or using Rahtjen's paint in this country during the period you have referred to?
A. I don't know at that period; I know who is selling it now, and has been for some time.
19 Q. Who do you refer to?
A. Mr. Petersen.
20 Q. The gentleman present in this room?

A. Yes, sir; Otto L. Petersen.

21 Q. How long have you known of Mr. Petersen selling a Rahtjen's composition?

A. After about the time when I began to make contracts for paint myself with our firm a few years ago.

22 Q. How is the Rahtjen's composition which Mr. Petersen sells or uses known to you?

A. I don't know what you mean.

392 Cross-examination by Mr. MERWIN:

23 X Q. In addition to the various brands of compositions which, as you say, the defendant has sold to your firm, has your firm not also been furnished by the defendant with International composition?

A. Not to my knowledge.

24 X Q. How long have you been chief clerk of your firm?

A. I think since '97; '96 or '97.

25 X Q. Is it part of your duties as chief clerk to make purchases of such compositions or to ask for estimates for them?

A. Yes, sir; such steamers as are line steamers.

26 X Q. Have you ever met Mr. Petersen?

A. No; I have known of him. I have never been introduced to him to my knowledge.

27 X Q. How many line steamers does your firm represent and what are they?

A. Red Cross steamers "Portia" and "Sylvia;" Tweedy Line steamer "Jason," and Tweedy Trading Co. steamer "Catania;" yachts "Nooya" and "Wanda."

JACOB H. HAFFNER.

Sworn to before me, &c.

BENJAMIN BARKER, *Ex'r.*

Adjourned to Wednesday, June 28th, at 11 a. m.

NEW YORK, *June* 28, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

ORRINGTON LUNNEKIN, a witness called on behalf of defendant, being duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

A. My name is Orrington Lunnekin; my age is 64 years, and residence 462 Jefferson avenue, Brooklyn. My occupation is superintendent of the New York Dry Dock and Repair Company, East river, New York.

393 2 Q. How long have you been superintendent of the New York Dry Dock Company?

A. I have been connected with the docks under the name of the New York Floating Dry Dock Company for 14 years and the New York Dry Dock and Repair Co. for three years; it's the same docks, only different names.

3 Q. What is done to vessels in these dry docks?

A. Well, there is painting and repairing; principally painting.

4 Q. Do you know John A. Donald & Co. or the defendant corporation?

A. Yes, sir.

5 Q. How long have you known John A. Donald & Co.?

A. Eight or ten years.

6 Q. What has been the business that John A. Donald & Co. carried on during the period that you have known them?

A. Painting ships, principally.

7 Q. What kind of paint or composition, if you know, did Donald & Co. sell or use for that purpose?

A. At present three paints; formerly, I think, two.

8 Q. Do you know the names of those paints?

A. Well, at the commencement they represented Holzapfel's Rahtjen paint and International paint, and they also represent a green composition.

9 Q. How long have you known of the sale or use of Holzapfel's Rahtjen's composition by John A. Donald & Co. in the port of New York?

A. Well, since Mr. Donald has been in the paint business I have understood that he represents those two things.

10 Q. Then you have known of his representing Holzapfel's Rahtjen's composition for about how many years past?

A. I should think about nine years; I can't be positive about the date.

11 Q. Do you know Mr. Otto L. Petersen here present?

A. Yes, sir.

12 Q. Do you know whether or not he represents any Rahtjen's composition or paint?

A. Yes, sir; I know he does.

13 Q. How is that Rahtjen's composition or paint known?

A. Hartmann's Rahtjen's composition, red-hand brand.

394 14 Q. About how long have you known of Mr. Petersen handling or representing such paint or composition?

A. I should judge about eight years.

15 Q. You have no interest in this controversy?

A. No, sir. None whatever.

16 Q. And you are not connected by relationship or otherwise with any of the parties?

A. No, sir.

17 Q. What was your position with the New York Floating Dry Dock Co.?

A. Secretary and superintendent.

18 Q. For how long?

A. Fourteen years; fourteen years as superintendent and about eight years as secretary.

19 Q. —.

Cross-examination by Mr. MERWIN:

20 X Q. For how many years have you been familiar with the business done at the docks you refer to, or others, in respect to the cleaning and painting of vessels?

A. Since I have been connected with the docks I have been familiar with painting ships on the docks.

21 X Q. How many years altogether does this cover?

A. It covers since 1886; about fourteen years.

22 X Q. Who represented or handled the Hartmann's Rahtjen's composition at these docks before Mr. Petersen?

A. Mr. Clark.

23 X Q. Who before Mr. Clark?

A. A German; Maecker.

24 X Q. Did you know Mr. Maecker or his connection with Rahtjen's composition before you were connected with the dry docks in 1885?

A. No, sir.

25 X Q. Are there any books of record in your charge that would show who represented or used Rahtjen's composition prior to 1885?

A. No, sir; or any other composition; we keep no record of such things.

26 X Q. Did Mr. Maecker or Mr. Clark, then, to your knowledge represent the Hartmann's Rahtjen's composition from 1885 down to the time when you knew of Mr. Petersen representing it?

A. Yes, sir.

395 Redirect examination by Mr. MCMASTER:

27 Re-D. Q. What was the general nationality of the vessels which John A. Donald painted?

Objected to as incompetent, irrelevant and incompetent, and not proper redirect.

A. British, Norwegian; any nationality that they could get a job on.

28 Re-D. Q. Do you know whether Donald & Co. in those early days painted more vessels of one nationality than of another, and, if so, what?

Same objection.

A. I should judge he painted more British than any other. I know that he has painted some Norwegian, Italian and American vessels, but I should judge he painted more British than any other nationality.

ORINGTON LINNEKIN.

Sworn to before me, etc.

BENJAMIN BARKER, *Ex'r.*

JOHN ADAIR, a witness called on behalf of the defendant, being duly sworn, testified as follows:

1 Q. What is your name, age, residence and occupation?

A. My name is John Adair; I am about 51 years old; I reside at 241 Forty-seventh street, Brooklyn, and my occupation is stevedore and superintendent of the Tweedy Trading Co.

2 Q. How long have you been in such position?

A. About eight years.

3 Q. And before that?

A. Master of steamers?

4 Q. How long have you been in this country continuously?

A. Twelve years; that is, eight years on shore continuously and before that I sailed out from here four years.

396 5 Q. Do you know John A. Donald & Co.?

A. I have known John A. Donald here present for a long time.

6 Q. Do you know what Mr. Donald's business is?

A. Since I have known him he has been in the paint business, and latterly in the steamship business as well.

7 Q. What kind of paint, if you know, did he handle or sell?

A. Well, to the best of my knowledge he always handled Holzapfel's paint, manufactured by Holzapfel, and Hartmann's International.

8 Q. How was the Holzapfel's paint known which Donald & Co. handled?

A. How do you mean? The way that I know it there was two paints: the Hartmann and the Holzapfel's.

9 Q. State whether or not you ever knew of Donald & Co. ever handling a Rahtjen paint?

Objected to as leading.

A. Yes; when I knew it first it went under the name of Suter Hartmann's.

10 Q. Did it go under that name when you knew Donald & Co. to be handling it?

A. At that time there was a Rahtjen manufacturing it and Holzapfels as well.

11 Q. And what kind of Rahtjen paint or composition did Donald & Co. handle?

A. Repeat that please?

12 Q. (Question 11, read to witness.)

A. As far as I know they handled Rahtjen's, manufactured by themselves.

13 Q. Manufactured you mean by Donald & Co.?

A. By Holzapfels.

14 Q. And for how many years past have you known of Donald & Co. handling or selling a Rahtjen's composition manufactured by Holzapfels?

A. Since ever I have been in the country.

397 15 Q. And ever since you have known Donald & Co. you have known of their handling this Rahtjen's composition, manufactured by Holzapfels?

A. Yes.

16 Q. Do you remember about how long you have known Donald & Co.?

A. I have known Donald & Co. since I have been here. I knew Donald before that.

17 Q. Did Donald & Co. ever paint any vessels for you with any composition, and, if so, what?

A. Yes.

18 Q. Do you remember what composition they used?

A. There was once or twice Hartmann's, manufactured by Holzapfels.

19 Q. State whether or not you ever had any of your vessels painted by John A. Donald & Co. with the Rahtjen's composition or paint?

Objected to as leading.

A. By the original Rahtjen's, here?

20 Q. You don't understand the question, and I ask the officer to repeat it to you. (Question 19 repeated.)

A. Yes; but, if I am allowed to ask, what I want to know is whether it was manufactured by Rahtjen or Holzapfels, that you are alluding to in this question?

21 Q. You can state in your answer by whom it was manufactured?

All of this is subject to the same objection.

A. When I got a tender from Donald for painting it was specified in the tender Rahtjen's paint, manufactured by Holzapfel's.

22 Q. And did you ever have any vessel painted by Donald & Co. with a Rahtjen paint manufactured by Holzapfel's?

Same objection.

A. Yes.

23 Q. What vessel, if you remember?

A. If I remember correctly, the steamer "Aguan."

398 24 Q. And that was about when?

A. Probably about five or six years ago. It may have been a little more than that; I couldn't give you the dates now.

25 Q. Was that the first time that you knew of a Rahtjen's composition manufactured by Holzapfel's?

A. No.

26 Q. How long did you know of it?

A. As near as I can remember, it must be somewheres in the neighborhood of 14 years.

27 Q. Was the painting of the "Aguan" the first instance of your having any personal transaction with Rahtjen's composition, Holzapfel's manufacture?

A. No.

28 Q. You can state any prior instance to the painting of the "Aguan," where you have had personal dealing or transaction with Rahtjen's composition, Holzapfel's manufacture?

A. I had it put on a steamer at Newcastle, England, about thirteen years ago. Thirteen to fourteen; I am not sure as to the date.

29 Q. Do you mean that you had a steamer painted with it at Newcastle, England?

A. Yes.

30 Q. Do you remember the name of the steamer?

A. "Totomo Maru."

31 Q. Do you remember any other instance when you had any dealing in Rahtjen's composition, Holzapfel's manufacture?

A. Yes.

32 Q. You may state what.

A. At the same time I took out a consignment to Japan.

33 Q. You mean a consignment of Rahtjen's composition, Holzapfel's manufacture?

This and the preceding question and answer objected to as incompetent, irrelevant and immaterial.

A. Yes.

34 Q. What did you do with the consignment when you arrived in Japan?

35 Objected to as incompetent, irrelevant and immaterial.

A. Sold it to the Japanese government.

Cross-examination by Mr. MERWIN:

37 X Q. You say, Captain, when you first knew this composition it went under the name of Suter Hartmann's?

A. Not this composition, the original, Suter Hartmann's. As I understand it, Hartmann's composition. Suter Hartmann was the original manufacturer. That is going back a good many years.

36 X Q. How far back can you remember Suter Hartmann's composition?

A. It must be all of 25 years.

37 X Q. How long ago did you know of the Suter Hartmann's Rahtjen's composition in this country before Holzapfel's?

A. I didn't know it in this country. I knew there was a Hartman's in this country, but the original I knew on the other side.

38 X Q. You have known the Rahtjen's composition sold by Donald in this country, then, for about eight years, is it?

A. About eight or ten years, I should think.

39 X Q. The Rahtjen's composition, made and sold by Holzapfel's and Donald, was first known as International, was it?

A. They manufactured International and Hartmann's as well, to the best of my knowledge.

40 X Q. And you have had vessels painted with the Holzapfel's International, too, I presume?

A. Yes.

41 X Q. That has been their leading composition, hasn't it?

A. As far as I have seen, they advertised them both.

42 X Q. Have you known of their recommending the International as being stronger or better than the Rahtjen?

Objected to as immaterial and irrelevant.

A. I don't know that I have. I have always had my choice—could take either.

400 43 X Q. Haven't they ever recommended the International to you as being better than the Rahtjen's?

A. I cannot say that they have.

Redirect examination by Mr. McMASTER:

44 Re-D. Q. In answer to X Q. 38, you say you have known the Rahtjen's composition sold by Donald in this country for about eight or ten years; whose manufacture was this Rahtjen's composition?

A. Manufactured by Holzapfel's.

JOHN ADAIR.

Sworn to before me, &c.

BENJAMIN BARKER, *Examiner.*

Defendant's counsel offers in evidence (certification being waived) Patent Office copy of registered trade-mark to M. Holzapfel & Co., No. 16643, dated May 28, 1889, and the same is marked "Defendant's Exhibit Defendant's U. S. Trade-mark of 1889."

Objected to by complainant's counsel as incompetent, irrelevant and immaterial.

Defendant's counsel also offers in evidence (certification being waived) U. S. registered trade-mark to Holzapfel's Compositions Company, Limited, No. 30310, dated June 29, 1897. And the same is marked "Defendant's Exhibit U. S. Trade-mark of 1897."

Same objection as before.

Defendant's counsel also offers in evidence a copy of Petersen's advertisement in the "Maritime Register" of June 4, 1890.

Complainant's counsel objects to the same as incompetent, irrelevant and immaterial, but consents that said copy be received subject to said objection, with the same force and effect as if the original was produced and introduced in evidence, but subject to comparison with the original and correction thereby.

401 The same is now marked in evidence, "Defendant's Exhibit Petersen's Advertisement in 'Maritime Register' of June 4, 1890."

Adjourned to July 6th, at 11 a. m.

NEW YORK, *July* 6, 1899.

Met pursuant to agreement.

Present: Counsel as before.

OSWALD MILLER, a witness produced on behalf of the defendant, having been first duly sworn, testifies as follows:

Q. 1. What is your name, age, residence and occupation?

A. My name is Oswald Miller; I am 59 years of age; reside at

Staten island, New York city, and am in the stevedore business, and am superintendent for R. W. Cameron & Company.

Q. 2. What is the business of Cameron & Company?

A. Export merchants and owners of ships. Their office is at 23 South William street.

Q. 3. How long have you been with them in their employ?

A. I have been with them since 1883.

Q. 4. Have your duties during all that period been the same?

A. Yes, sir.

Q. 5. What are your duties in a general way?

A. I look after their ships when they arrive in port here, in regard to their outfitting, etc., and the docking of them.

Q. 6. For what purpose are the ships docked?

A. The iron or steel ships are docked to have their bottoms cleaned and painted, to protect them against corrosion and fouling on the voyage.

Q. 7. What is the first thing that you do in behalf of Cameron & Company when one of their vessels is to be docked and painted?

A. We ask for tenders from different people in the business of supplying anti-fouling paint.

402 Q. 8. Is that always the case?

A. Yes; most always; late years we haven't done so much.

Q. 9. Do you know John A. Donald?

A. Yes, sir.

Q. 10. And likewise the defendant The Holzapfel's Compositions Co., Limited?

A. Yes, sir.

Q. 11. How long have you known John A. Donald & Co.?

A. Since 1890, the first time.

Q. 12. How did you become acquainted with him or his firm?

A. Up to that year we had used an anti-fouling paint called Mc-Innes' composition. We came to the conclusion it was too expensive, and wanted a cheaper paint. Mr. Donald came and asked if he could make a tender for his paint, and we found his price was so much less than we had been paying we accepted his tender.

Q. 13. What paint did Donald & Company supply?

A. He supplied Rahtjen's paint, manufactured by Holzapfels.

Q. 14. Do you remember the name of the vessel on which this Holzapfel's Rahtjen's composition was used?

A. Yes, sir; it was the three-masted iron schooner called the "Gelert."

Q. 15. And that was in what year, you say?

A. In 1890.

Q. 16. Do you know of any other ships owned by R. W. Cameron & Company which were painted by Donald?

A. Yes, sir.

Q. 17. Name a few of them.

A. The bark "Star of the East;" the bark "Clan McLeod" and the ship "Puritan."

Q. 18. Do you know what paint was used in painting these vessels?

A. Yes, sir.

Q. 19. What paint or composition?

A. Rahtjen's paint made by Holzapfels.

Q. 20. And do you know about what years these vessels were painted?

A. From 1890 up to the present time with the exception of the ship "Puritan," once.

Q. 21. And who painted the ship "Puritan" on this occa-
403 sion when it was not painted by Donald & Company, with Holzapfel's Rahtjen's composition?

A. Mr. Petersen.

Q. 22. How did Mr. Petersen come to paint the "Puritan" on that occasion?

A. Because his tender was about a hundred dollars less than Mr. Donald's at that time.

Q. 23. Do you know what paint or composition Mr. Petersen used on the "Puritan" on that occasion?

A. Yes, sir.

Q. 24. What paint?

—. It was Rahtjen's made by Hartmann.

Q. 25. About when was this, that Mr. Petersen painted the "Puritan"?

A. About in 1892, I think.

Q. 26. Was there any secret about John A. Donald & Company selling or furnishing or using the Holzapfel's Rahtjen's composition?

Objected to as incompetent, irrelevant and immaterial, it not being shown that the witness is competent to testify as to the manner in which the defendant has conducted its business.

A. Not that I know of. I have heard it talked about ever since I first came in contact with it, as we load 40 and 50 ships a year for Australia and most of them with this paint on them. I have always asked the different ships that I have come in contact with what paint they used.

Objected to as hearsay evidence.

Q. 27. Was it or not a matter of public notoriety in 1890, and since then, that John A. Donald & Company furnished and sold Holzapfel's Rahtjen's composition?

Same objection as to previous question.

A. I should certainly say so.

Q. 28. So far as your knowledge goes, did or did not ship-owners and ship agents generally know that to be a fact?

404 Objected to as incompetent, irrelevant and immaterial and as calling for hearsay evidence.

A. I should think they must have known it because about two-thirds of the ships that we have loaded were painted with Donald's paint.

Q. 29. Have you any interest in the defendant company?

A. Nothing whatever or anything connected with it.

Q. 30. You say that two-thirds of the ships which "we have loaded" were painted with Donald's paint? What paint do you mean?

A. Rahtjen's.

Q. 31. The Rahtjen's composition manufactured by Holzapfels and sold by Donald & Company?

A. Yes, sir.

Q. 32. When you say two-thirds of the ships "we have loaded" were painted with this composition, do you mean vessels that were owned by R. W. Cameron & Company or vessels that were consigned to them?

A. Vessels that were chartered and loaded for Australia by the firm of R. W. Cameron & Company.

Cross-examined by Mr. MERWIN:

X Q. 33. What other brands of compositions for ship bottoms have Donald & Company or the defendant furnished your firm other than Rahtjen's?

A. They have furnished us once or twice with a paint, I believe they call it the International, as an experiment, but we didn't like it; it didn't seem to be satisfactory and we stuck to the Rahtjen's.

X Q. 34. Do you mean to say, Captain, that your firm has used International composition only experimentally?

A. That is all.

X Q. 35. What other brand have Donald & Company or the defendant furnished your firm?

A. Only Ra*th*jen's.

X Q. 36. Do you know any of their other brands?

A. I do not.

405 X Q. 37. Don't you know their McInnes paint?

A. No, sir.

X Q. 38. How do you know that most of the forty or fifty ships a year which R. W. Cameron & Co. have loaded have Holzapfel's Ra*th*jen's compositions on them?

A. I have loaded them all and I make it my business, too, to find out whose paint they have been painted with.

X Q. 39. How do you find out?

A. By asking the captain what kind of paint they had on the ship bottom. Every ship that we load is put on the dock and painted before they go on the loading berth, with very few exceptions.

X Q. 40. Do you mean to say that all of the vessels you now speak of have been, before you loaded them, painted by the defendant or by John A. Donald & Company, to your own personal knowledge with Holzapfel's Ra*th*jen's composition?

A. Yes, sir.

X Q. 41. I ask you how do you know of your own personal knowledge that that is the fact?

A. Of course I only know what I have been told by the captains of the ships. I didn't see the ships painted.

Complainant's counsel gives notice that at the hearing of this

cause he will move to strike out the answers of this witness to questions 26 and 28, for the reason that under cross-examination he has admitted that the statements he made in answer to said questions were not of his own knowledge, but what he had been told by others, and, therefore, hearsay and incompetent.

X Q. 42. Where were and have been the 40 or 50 vessels a year that you speak of owned in this country or abroad?

A. Nearly all abroad, with very few exceptions.

X Q. 43. Then their bottoms were painted abroad?

A. Painted here in New York.

X Q. 44. All of them?

A. Certainly, the vessels that I refer to are all painted here
406 in New York as are all the vessels chartered for the Australian trade. If not painted they must have the charterer's consent not to be painted.

X Q. 45. For how many vessels a year does Donald & Company furnish anti-fouling compositions for R. W. Cameron & Company?

A. Two vessels a year. They own only two vessels now.

X Q. 46. I ask not how many vessels were owned by Cameron & Co., but for how many vessels do Donald & Company in a year furnish to Cameron & Company anti-fouling composition?

A. Two, as I told you, the only two vessels they own now.

X Q. 47. Where vessels are chartered by Cameron & Co., and require painting before they are loaded and sent to sea by you, is such painting upon the order or in any way under the charge or direction of R. W. Cameron & Co.?

A. Certainly not, but they must all be painted with some kind of paint before we accept them.

X Q. 48. What is the tonnage of the bark "Star of the East"?

A. Seven hundred and thirty-five tons.

X Q. 49. For giving her bottom one coat of anti-corrosive composition and one coat of anti-fouling composition how many gallons of Holzapfel's Rahtjen's compositions are required?

Objected to as immaterial and incompetent.

A. I can't tell. I don't know anything about it. There is a contract for so much money to give the vessel a good coat of protective and a good coat of anti-fouling paint up to a certain dratt.

X Q. 50. And with all of your long experience in the docking and painting of vessels you have no idea how much paint is required to coat the bottom of a vessel; is that so?

Same objection.

A. Entirely immaterial as long as it is properly done.

407 X Q. 51. Is it immaterial whether one brand of paint would require twice as much to coat the vessel as another when you were deciding between the two paints?

Same objection.

A. Of course it is immaterial to us. The docking that we do now is done so much lump sum—towage to the dock, the docking of the

ship, painting of her, delivering of her at the loading berth for so much money—lump sum; that is the customary way of doing that business now.

X Q. 52. What is the tonnage of the "Gelert"?

A. About 300 tons, less than 300 tons. I think that is it; she was lost about eight or nine years ago.

X Q. 53. What is the tonnage of the "Clan McLeod"?

A. Six hundred and forty-seven tons.

X Q. 54. What of the "Puritan"?

A. Two thousand two hundred; she was sold six years ago.

OSWALD MILLER.

Sworn to before me, &c.

BENJAMIN BARKER, *Ex'r.*

408 United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION CO., Complainant, *vs.* HOLSAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant. } In Equity.

Proofs for final hearing, taken on behalf of the defendant pursuant to stipulation heretofore entered into and under the 67th rule of the supreme court for courts in equity, as amended, and under the Revised Statutes of the United States, before Mr. Alexander Ridgeway, notary public, Middlesex county, at 77 Cornhill, London, at 11 o'clock in the forenoon, on August 1st, 1899.

At request of complainant's counsel the examination is adjourned to August 8th, at the same time and place.

77 CORNHILL, LONDON, 11 A. M., *August 8th*, 1899.

Met pursuant to adjournment.

Present: R. B. McMaster, Esq., of counsel for defendant, and T. D. Merwin, Esq., on behalf of complainant.

MAX HOLZAPFEL, witness produced on behalf of the defendant, having been first duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

409 A. My name is Max Holzapfel. I am 38 years old. I reside at Newcastle-on-Tyne; manufacturer. I am a manufacturer of compositions and paints.

2 Q. Are you in business for yourself individually, or in connection with or an officer of any corporation?

A. Officer and stockholder in The Holzapfel's Compositions Company, Limited, the defendant in this suit. I am chairman of the company.

3 Q. What is the business of that company?

A. Manufacturer of various anti-corrosive and anti-fouling compositions for ships' bottoms, and amongst them genuine "Rahtjen's patent" composition.

4 Q. How long has the defendant company been engaged in the manufacture of such compositions, and especially of the genuine "Rahtjen's patent" composition?

A. Since the incorporation of the company in 1890, continuously. And previous to the formation of the defendant's company in 1890 I carried on the same business in partnership with two of my brothers from 1881, under the name of M. Holzapfel & Co.

5 Q. Where is the place of business and factory of the defendant company, and where was the business and factory of M. Holzapfel & Co.?

A. The office at Newcastle-on-Tyne, and the works at Gateshead-on-Tyne. We have branch offices at 57 Fenchurch street, London; Mount Stuart, Cardiff; Chapel street, Liverpool; Waterloo street, Glasgow, Welles buildings, 18 Broadway, New York, and at Hamburg, Genoa, Sebastopol, Budapest, Copenhagen, and various other places.

6 Q. Was 1881 your first connection with the business of dealing in compositions for ship's bottoms?

A. No; previous to that I was clerk in the office of A. C. Holzapfel, who was agent for the sale of Rahtjen's patent composition at Newcastle-on-Tyne.

7 Q. From what time to what time were you clerk for A. C. Holzapfel?

A. From 1879 until, I believe, November, 1881.

8 Q. Did A. C. Holzapfel manufacture the "Rahtjen patent" composition at that time, and, if not, from whom did he receive it for sale or use?

410 A. He did not manufacture it, but bought it from Suter Hartmann & Company; they were at that time the sole manufacturers of Rahtjen's patent composition.

9 Q. Suter Hartmann & Co.'s place of business was where?

A. At London. The factory was also at the same place.

10 Q. What were your duties as clerk in the employ of A. C. Holzapfel?

A. I kept the books, attended partly to the correspondence, visited captains and owners, soliciting orders and superintended the application of the composition.

11 Q. Were your duties of such a character as to familiarize you thoroughly with the business carried on by A. C. Holzapfel at that time?

A. Yes.

12 Q. How was this "Rahtjen's patent" composition which A. C. Holzapfel purchased from Suter Hartmann & Co. put up and marked?

A. It was put up in wooden barrels and marked "S. H. & Co." on one side with numbers and port mark.

13 Q. State whether or not the words "Rahtjen's composition" or "Rahtjen's patent" composition, or the like, appeared anywhere on the wooden barrels which were received from Suter Hartmann & Co.?

A. No. No such words appeared.

14 Q. Look at the photograph "Defendant's Exhibit Photograph of Barrel Heads" now shown you and state if you know what that represents?

Objected to as incompetent, irrelevant and immaterial.

A. I recognize the wooden barrels as being the barrels in which "Rahtjen's patent" composition was received by A. C. Holzapfel.

15 Q. You recognize the photograph as a correct representation of the barrel heads and markings; is that what you mean?

Same objection.

A. Yes, I do.

412 16 Q. And as I understand your testimony there was no other marking placed on the barrels containing "Rahtjen's patent" composition, as sold by Suter, Hartmann & Company or by A. C. Holzapfel except such as shown in the photograph shown you?

Objected to as leading and otherwise incompetent, irrelevant and immaterial.

A. I have never seen "Rahtjen's patent" composition during my connection with A. C. Holzapfel in any other packages, or with any other marks, than those shown in the photograph.

17 Q. Can you produce the bill of the photographers for taking said photograph?

A. Yes, and I now do so.

The bill now produced by the witness is offered in evidence and marked "Defendant's Exhibit Bill for 1883 Photograph."

Objected to as incompetent, irrelevant and immaterial.

18 Q. Do you — where Gray Brothers, the photographers who took said photograph, can now be found?

Objected to as incompetent, irrelevant and immaterial.

A. The firm is not now in existence, and it has been impossible for me to trace the address of one of the partners who is said to be alive. I understood that only one was alive, and I cannot trace him.

Defendant's counsel offers in evidence the photograph heretofore marked for identification "Defendant's Exhibit Photograph of Barrel Heads."

Objected to as incompetent, irrelevant and immaterial.

412 19 Q. Read the marking on the lower pair of barrel heads on said photograph and explain what they mean.

Same objection.

A. On one side the markings are "Priming" and underneath, in smaller type, "Stir well before using;" on the reverse side "S. H. & Co., 48939 South Shields." "Priming" means that priming composition, or first coating, was contained in the barrel. "Stir well before using" explains itself. "S. H. & Co." stands for the initials

of Suter, Hartmann & Co. "48939" is the running number, and "South Shields" stands for the port mark.

20 Q. Now, read the markings on the upper barrel heads represented on the said photograph and explain what they mean.

Same objection.

—. Three parallelograms with dots between, and the words "Stir well before using" are on one side, and on the other "S. H. & Co. 48941 South Shields." The three parallelograms with dots between meant that the barrel contained number III. or anti-fouling composition. "Stir well before using" explains itself. "S. H. & Co." on the reverse side represents again the initials of the firm of Suter, Hartmann & Co. "48941" represents the running number, and "South Shields" the port mark.

21 Q. While you were with A. C. Holzapfel did he sell the said composition in the barrels or casks in which he received it, or did he merely apply the composition to ship's bottom?

Same objection.

A. In some cases the composition was sold per hundredweight to customers; in other cases it was sold per lumpsum contract.

413 In those cases the composition was sent to the steamer, and application was superintended by one of the employees. In all cases the composition was supplied in the identical barrels in which it was received.

22 Q. And how about the markings on the barrels?

Same objection.

A. The markings on the barrels were never altered.

23 Q. Was anything added to the markings on the barrels?

Same objection.

A. No, never.

24 Q. Was, or was not, this the invariable custom throughout the period of your employment by A. C. Holzapfel?

The same objection, and further objected to because leading.

A. I don't understand the question.

25 Q. During all the period of your employment by A. C. Holzapfel was there any other marking placed on the barrels containing said composition, either as they were received from Suter, Hartmann & Co., or as they were sold or disposed of by A. C. Holzapfel, except such as shown on the photograph?

Objected to as incompetent, irrelevant, and immaterial.

A. No, never.

26 Q. Now, let me ask you, if you know, how, as between Suter, Hartmann & Co. and A. C. Holzapfel, the said composition was billed or invoiced?

Same objection.

A. It was invoiced as Rahtjen's patent composition.

414 27 Q. What was meant by, or what was the meaning of Rahtjen's patent composition?

A. I always understood it to mean that the composition was manufactured according to Mr. Rahtjen's specification of patent.

28 Q. What Mr. Rahtjen?

A. Mr. Heinrich Rahtjen.

29 Q. And under what patent?

A. Under the English patent No. 3920 of 1873.

30 Q. During your connection as clerk with A. C. Holzapfel, was this composition (put up in the barrels and marked as shown in the photograph) used and sold to a large or small extent by A. C. Holzapfel?

Same objection.

A. The composition was sold in fairly large quantities, and was always sold as "Rahtjen's patent" composition.

31 Q. Now, when you formed the copartnership of M. Holzapfel & Co. with your brothers and cousins, and commenced the manufacture of said composition, how did you put it up and how did you mark it?

Same objection.

A. The composition for home use we put up in wooden barrels; the composition for export we put up in iron drums. After 1883 we marked the composition according to the registered trade-mark, the Rahtjen's composition, as "Genuine Rahtjen's composition for ships' bottoms." The number three, with three parallelograms in centre. The composition was advertised as "Genuine 'Rahtjen's patent' composition." In 1886 or 1887 we added the propeller to this trade-mark.

32 Q. Where did you manufacture and sell, under the copartnership name of M. Holzapfel & Co. the "Genuine Rahtjen's composition" or the "Genuine 'Rahtjen's patent' composition"?

A. It was manufactured at Gateshead-on-Tyne, and it was sold to most maritime countries in the world.

415 33 Q. And during the continuation of the firm of M. Holzapfel & Co. this composition was put up in the manner and with the mark substantially as described by you in your preceding testimony?

Objected to as incompetent, irrelevant and immaterial.

A. Yes.

34 Q. What representation, if any, did your firm of M. Holzapfel & Co. make to the public regarding this particular composition manufactured and sold by them?

The same objection.

A. It was represented as being manufactured in accordance with a specification of patent by Heinrich Rahtjen, No. 3920 of 1873, and for many years we attached a guarantee that the composition, so in-

voiced, was made in conformity with the specifications of the patent.

35 Q. Was, or was not, any representation made to the public as to by whom the "Rahtjen's patent" composition handled by your firm was manufactured?

The same objection.

A. In former years we were at times questioned as to by whom the Rahtjen's composition sold by us was manufactured, and we always took pains to explain that it was our own manufacture which we were offering for sale.

36 Q. That is, as I understand you, you represented that it was manufactured by your firm in accordance with the specification of the Heinrich Rahtjen patent of 1873 before referred to. Is that correct?

The same objection.

A. Yes.

416 37 Q. How were these representations made, verbally or otherwise?

The same objection.

A. Mostly verbally, but sometimes we may have had to explain in writing. Of course we advertised the sale of our manufacture of Rahtjen's composition very freely.

38 Q. And did you advertise that it was made in accordance with the specification of the Heinrich Rahtjen patent?

Same objection.

A. In some of our advertisements it was distinctly stated that it was manufactured in accordance with the specification of the patent.

39 Q. State whether or not you did so, when you first began to manufacture the said composition.

Same objection, and further objected to as leading.

A. Yes, we did.

40 Q. At the time that M. Holzapfel & Co. began to manufacture this composition and mark it as the "Genuine Rahtjen's composition" or "Rahtjen's patent composition" on the vessels containing it, how did Suter, Hartmann & Co. mark the vessels containing the composition made by them?

Objected to as incompetent, irrelevant and immaterial.

A. At the time we commenced to manufacture Rahtjen's composition, and to mark it as previously described, Suter, Hartmann & Co. still adhered to their old marks as shown in the photograph.

417 41 Q. You say in your previous testimony that this composition manufactured by M. Holzapfel & Co. was sold in most maritime countries in the world. Was it ever sold in the United States to your knowledge, and, if so, when first, as near as you can tell?

A. It was first sold in the United States in 1884, and has been sold there continuously since.

42 Q. Under what name or marking was it sold in the United States in 1884?

Objected to unless the question and answer are *respective* to the personal knowledge of the witness.

A. It was marked "Rahtjen's anti-fouling composition for ships' bottoms" in a circle; three parallelograms in the centre; "H. & Co.," over the parallelograms, and the words "Stir well before using," below the parallelograms, and it was invoiced as "Genuine 'Rahtjen's patent' composition."

43 Q. To whom, if you know, was the first sale of this composition, manufactured by your firm under the specification of said patent, made in the United States in 1884?

A. To Woodward, Wight & Co., of New Orleans.

44 Q. When was the present defendant company organized or formed?

A. 1890.

45 Q. Did the firm of M. Holzapfel & Co. have any agent in the United States for the sale of said composition?

A. Yes; we had several agents at several ports. To New York we first sent a man from Europe called Perry to represent us; later on the agency was transferred to McCaldin Bros., and after that to Mr. John A. Donald. In San Francisco we had A. C. Dietz & Co.; at New Orleans, Woodward, Wight & Co. We had agents at Boston, Philadelphia and Baltimore, but their names have escaped my memory.

46 Q. What was done with the business of M. Holzapfel & Co. when the present defendant company was formed?

A. The assets, good will and trade-marks were sold to the present limited company.

418 47 Q. And the business carried on by the defendant company is what, and has been carried on in what way?

A. It is a continuation of the business of M. Holzapfel & Co., and has been carried on in the same way.

48 Q. When you say, in answer to Q. 46, that the trade-marks owned by M. Holzapfel & Co. were transferred to the present defendant upon its present formation, do you or not refer to all trade-marks owned by said firm, and whether registered in foreign countries as well as in England?

A. All trade-marks registered in the United Kingdom were transferred to the company and all foreign trade-marks held by M. Holzapfel & Co. were transferred to the company, except those for Russia and Spain.

49 Q. How was it that your firm of M. Holzapfel & Co. commenced to manufacture a composition in accordance with the specification of the Heinrich Rahtjen patent of 1873?

A. Because the patent had expired and the specification became public property.

50 Q. And during the life of the Heinrich Rahtjen patent of

voiced, was made in conformity with the specifications of the patent.

35 Q. Was, or was not, any representation made to the public as to by whom the "Rahtjen's patent" composition handled by your firm was manufactured?

The same objection.

A. In former years we were at times questioned as to by whom the Rahtjen's composition sold by us was manufactured, and we always took pains to explain that it was our own manufacture which we were offering for sale.

36 Q. That is, as I understand you, you represented that it was manufactured by your firm in accordance with the specification of the Heinrich Rahtjen patent of 1873 before referred to. Is that correct?

The same objection.

A. Yes.

416 37 Q. How were these representations made, verbally or otherwise?

The same objection.

A. Mostly verbally, but sometimes we may have had to explain in writing. Of course we advertised the sale of our manufacture of Rahtjen's composition very freely.

38 Q. And did you advertise that it was made in accordance with the specification of the Heinrich Rahtjen patent?

Same objection.

A. In some of our advertisements it was distinctly stated that it was manufactured in accordance with the specification of the patent.

39 Q. State whether or not you did so, when you first began to manufacture the said composition.

Same objection, and further objected to as leading.

A. Yes, we did.

40 Q. At the time that M. Holzapfel & Co. began to manufacture this composition and mark it as the "Genuine Rahtjen's composition" or "Rahtjen's patent composition" on the vessels containing it, how did Suter, Hartmann & Co. mark the vessels containing the composition made by them?

Objected to as incompetent, irrelevant and immaterial.

A. At the time we commenced to manufacture Rahtjen's composition, and to mark it as previously described, Suter, Hartmann & Co. still adhered to their old marks as shown in the photograph.

417 41 Q. You say in your previous testimony that this composition manufactured by M. Holzapfel & Co. was sold in most maritime countries in the world. Was it ever sold in the United States to your knowledge, and, if so, when first, as near as you can tell?

A. It was first sold in the United States in 1884, and has been sold there continuously since.

42 Q. Under what name or marking was it sold in the United States in 1884?

Objected to unless the question and answer are *respective* to the personal knowledge of the witness.

A. It was marked "Rahtjen's anti-fouling composition for ships' bottoms" in a circle; three parallelograms in the centre; "H. & Co.," over the parallelograms, and the words "Stir well before using," below the parallelograms, and it was invoiced as "Genuine 'Rahtjen's patent' composition."

43 Q. To whom, if you know, was the first sale of this composition, manufactured by your firm under the specification of said patent, made in the United States in 1884?

A. To Woodward, Wight & Co., of New Orleans.

44 Q. When was the present defendant company organized or formed?

A. 1890.

45 Q. Did the firm of M. Holzapfel & Co. have any agent in the United States for the sale of said composition?

A. Yes; we had several agents at several ports. To New York we first sent a man from Europe called Perry to represent us; later on the agency was transferred to McCaldin Bros., and after that to Mr. John A. Donald. In San Francisco we had A. C. Dietz & Co.; at New Orleans, Woodward, Wight & Co. We had agents at Boston, Philadelphia and Baltimore, but their names have escaped my memory.

46 Q. What was done with the business of M. Holzapfel & Co. when the present defendant company was formed?

A. The assets, good will and trade-marks were sold to the present limited company.

418 47 Q. And the business carried on by the defendant company is what, and has been carried on in what way?

A. It is a continuation of the business of M. Holzapfel & Co., and has been carried on in the same way.

48 Q. When you say, in answer to Q. 46, that the trade-marks owned by M. Holzapfel & Co. were transferred to the present defendant upon its present formation, do you or not refer to all trade-marks owned by said firm, and whether registered in foreign countries as well as in England?

A. All trade-marks registered in the United Kingdom were transferred to the company and all foreign trade-marks held by M. Holzapfel & Co. were transferred to the company, except those for Russia and Spain.

49 Q. How was it that your firm of M. Holzapfel & Co. commenced to manufacture a composition in accordance with the specification of the Heinrich Rahtjen patent of 1873?

A. Because the patent had expired and the specification became public property.

50 Q. And during the life of the Heinrich Rahtjen patent of

1873 the composition made in accordance with its specification was known to the trade and the public as what?

Objected to as incompetent and immaterial.

A. Before 1883 I have only known of one Rahtjen's patent composition sold and manufactured in this country, and this was sold by Suter, Hartmann & Co., and I always understood that this composition was manufactured in accordance with the Heinrich Rahtjen's patent.

51 Q. When the firm of M. Holzapfel & Co. commenced to manufacture a composition in accordance with the specification of the Heinrich Rahtjen's patent of 1873 and advertised it to the public and marked it as "Genuine 'Rahtjen's patent' composition," or words substantially to that effect, were or were not these facts known to Suter, Hartmann & Co.?

Objected to as incompetent, irrelevant and immaterial.

419 A. We sent a circular to them and from the reply circular Suter, Hartmann & Co. issued it was plain that they were acquainted with the fact that we had started to manufacture Rahtjen's composition. In subsequent years they have repeatedly stated by circular that Rahtjen's composition of other makers, were in the field and warned their customers against using anything but "Rahtjen's composition, Hartmann's manufacture."

52 Q. Did Suter, Hartmann & Co. ever seek to enjoin your firm of M. Holzapfel & Co., or the present defendant company, from the use of the words Rahtjen's composition, or substantially such words in which the name Rahtjen's appeared as a name to describe the composition manufactured and sold by your firm or their successors the present defendant company?

A. No, never.

53 Q. Did they ever sue you or your firm, or the present defendant company, for using the word Rahtjen to describe the composition made and sold by you?

A. No.

54 Q. Has any one else at any time, other than the present complainant, sued you or your firm, or the present defendant company, for using the said name Rahtjen?

A. Yes. Mr. John Rahtjen sued us in Hamburg once.

55 Q. And in that suit were you enjoined or restrained from using the word "Rahtjen" as part of the name to describe the composition manufactured by you or your firm or the present defendant?

A. The judge held that no one could restrain us from using the words "Rahtjen's composition."

The two questions and answers immediately preceding are objected to as calling for and producing evidence which is incompetent, irrelevant and immaterial, being secondary in character, and notice is hereby given that at the final hearing of this action motion will be made to the court to strike the same from the record.

420 56 Q. At any time subsequent to your firm of M. Holzapfel & Co. commencing the manufacture of this composition made in conformity with the Heinrich Rahtjen's patent of 1873, did your said firm or their successors in business—to wit, the present defendant company—ever discontinue the use of the word "Rahtjen" as part of the name descriptive of the composition made and sold by them?

A. No, never.

57 Q. Does the defendant company still sell its composition in Germany, and especially in Hamburg?

A. Yes: we still sell in Germany and Hamburg.

58 Q. And under what name or title is the said composition sold by the defendant in Germany, and especially Hamburg, at the present time?

Objected to as incompetent, irrelevant and immaterial.

A. We have always sold International composition. With the exception of two isolated instances out of which the action by Mr. Rahtjen arose before this and after this, we have had no sale for Rahtjen's composition in Germany.

59 Q. What is the reputation of the Rahtjen's composition made and sold by the defendant company?

A. Reputation first class.

60 Q. State whether or not the volume of business done by your firm and defendant company in said composition has increased from the time you commenced to manufacture it down to the present day?

Objected to unless the question and answer are respective to the business done in the United States, and supplemented by such specific evidence in respect thereto as will enable the complainant to test the accuracy thereof.

A. The business has increased steadily every year.

Adjourned by consent to 10.30 a. m., August 9th, to room 10, Cannon Street hotel.

421 AUGUST 9TH, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of MAX HOLZAPFEL continued:

61 Q. Give the volume of business done by the firm of M. Holzapfel & Co., and also by their successors in business, the defendant corporation, year by year, from the commencement of the manufacture of this composition, sold as "Rahtjen's patent" composition. I wish you to confine your answer to the volume of business done in the manufacture and sale of this particular composition.

Objected to as incompetent, irrelevant and immaterial unless restricted to the business done in the United States.

A.—

	cwt.	qrs.	lbs.
In 1883	733		
In 1884	928	1	22
In 1885	1,253		
In 1886	1,350	3	0
In 1887	1,657	3	27
In 1888	4,248	3	18
In 1889	1,022	3	0
In 1890	1,256	2	23
In 1891	2,234	2	21
In 1892	1,642	0	14
In 1893	1,432	0	11
In 1894	3,399	0	1
In 1895	2,415	2	0
In 1896	3,399	1	6
In 1897	2,090	2	0

The foregoing answer is further objected to as being secondary evidence.

422 62 Q. The figures that you have given in your last answer, as I understand you, represent the volume of business done by your firm or the defendant company in the sale of "Rahtjen's patent" composition from the time that your firm first commenced to manufacture and sell it down to a few months preceding the commencement of the present suit?

A. They do.

63 Q. Can you give me the volume of business done by your firm or by the defendant company in the shipment or sale of the "Rahtjen's patent" composition in the United States manufactured by the said firm or the said company during the same period?

A. Yes, I can.

	cwt.	qrs.	lbs.
In 1883	7		
In 1884	45	2	0
In 1885	Nothing.		
In 1886	60		
In 1887	Nothing.		
In 1888	16		
In 1889	30		
In 1890	37	0	19
In 1891	10		
In 1892	380		
In 1893	192	2	0
In 1894	218	3	0
In 1895	292	2	0
In 1896	201	2	0
In 1897	407	1	0

64 Q. Give me the names of some of your customers to whom your firm, or its successors the defendant company, sell or sold Rahtjen's

composition manufactured by the said firm or by the said company?

A. The British government, the India office, the Austrian government, the Spanish government, the Turkish government, the Brazilian government, Sir Donald Currie & Co., the North German Lloyd, Compania Transatlantica, Nipon Yusen Kaisha, the Japanese government and various others.

423 65 Q. How is it that you did not sell your Rahtjen's composition in Germany?

Objected to as incompetent, irrelevant and immaterial.

A. Certain of the raw materials are materially cheaper in Germany, and Mr. Rahtjen there can manufacture cheaper, and it would not pay us to compete against him in this brand.

66 Q. How about the cost of transportation? Would that also enter into consideration?

Same objection.

A. No, the transportation is not a heavy item. It would not materially affect the prices.

67 Q. Does the defendant company claim, or has it or its predecessors in business ever claimed, the exclusive right to use the word "Rahtjen" as part of the name descriptive of the composition made by it?

Same objection.

A. No, never. We have always used the word "Rahtjen's" in conjunction with the design and in conjunction with our own name Holzapfel.

68 Q. Do you know of any other person, firm or corporation except the defendant company and the complainant, namely—The Rahtjen's American Composition Company, manufacturing and selling composition under the name of "Rahtjen" composition, or under a name in which the word "Rahtjen" appears as part thereof?

The same objection.

A. First and foremost Suter, Hartmann and Rahtjen Composition Company, Limited, in this country, Mr. John Rahtjen, of Hamburg, Turner Morrison & Company, of Calcutta, London Oil and
424 Colour Company, at Antwerp, Dr. Pflug, of Kiel, a firm in Liverpool whose name I have forgotten, also Messrs. Holzapfel & Company, of Sebastopol.

69 Q. Has the defendant company or its predecessors in business ever expended any considerable amount in advertising the "Rahtjen" composition manufactured and sold by it or them; and, if so, about how much?

The same objection.

A. Our advertising expenses have averaged between £1,500 and £1,800 per annum, and in all our advertisements the "Rahtjen" composition was prominently advertised.

70 Q. And as manufactured by whom?

A. As manufactured by us.

71 Q. What was it, if anything, that gave value to the name "Rahtjen's" composition or to the word "Rahtjen" as used in connection with other words descriptive of a composition for ships' bottoms?

A. The patent, or rather, I should say, the specification of patent, by Heinrich Rahtjen.

72 Q. How do you know that?

A. When our Rahtjen composition was being sold we were asked by customers whether the composition was manufactured according to the Rahtjen patent, and these repeated questions showed that what they wanted was an article manufactured in accordance with the patent.

73 Q. Are Suter, Hartmann & Company to whom you have referred in your previous testimony still in existence as a copartnership?

A. The firm of Suter, Hartmann & Company was, about 1887, turned into a limited company, now called Suter, Hartmann & Rahtjen's Composition Company, Limited.

74 Q. Have you ever seen any of the Rahtjen's composition manufactured and sold by Suter, Hartmann & Rahtjen's Composition Company, Limited, as put up and marked by them or any advertisements of said company advertising such composition for sale?

425 Objected to as incompetent, irrelevant and immaterial.

A. Yes, I have seen it frequently. Their composition is contained in their barrels or drums, and these were marked "Genuine Rahtjen's composition." Then a red hand, very prominent and below "Hartmann's manufacture." I have also seen their advertisements from year to year, and I have noticed that in all their advertisements stress is laid upon the red hand and upon the words "Hartmann's manufacture."

75 Q. In what way do they lay stress on the red hand?

Same objection.

A. By warning their customers that no Rahtjen composition is genuine or is of their make, unless the red hand is shown on the vessels containing it and the words "Hartmann's manufacture" appearing on those vessels.

76 Q. Can you and will you give the names of the agents for your firm or for the defendant corporation in America to whom you sold or sent the Rahtjen composition during the several years referred to in one of your previous answers?

A. I can and now do so.

Woodward, Wight & Company, Limited, 406–418 Canal street, New Orleans, appointed July 23d, 1884, to date.

Holzapfel & Company, New York, per James Perry, appointed October 24th, 1884, to March, 1885.

McCaldin Bros., New York, appointed May, 1885.

John Reece, Bourse buildings, Philadelphia, appointed October 9th, 1885, to April 8th, 1895.

J. D. Spreckles & Bros., San Francisco, appointed May 6th, 1886 to March, 1887.

McKenzie, Oertling & Company, Pensacola, Fla., appointed July 14th, 1887, to date.

426 A. C. Dietz & Company, 9 Front street, San Francisco, appointed September 1st, 1888, to date. Name of firm changed to C. G. Clinch & Company in 1899.

John A. Donald & Company, New York, appointed June, 1889, to October 21st, 1890.

W. H. H. Bixler & Company, 500 Hughes street, Baltimore, appointed 1891 to 1895.

Geo. W. Church, 223 Water street, Norfolk, appointed about 1893 to 1898.

Griffith, Stetson & Company, Port Townsend, Washington, appointed about 1893 to 1894.

John Reid & Co., Portland, Oregon, appointed May 20th, 1893, to date.

Hugh Ramsay, Perth Amboy, appointed April 12th, 1894, to date.

T. S. Marvel & Co., ship-handlers, Newburgh, New York, appointed April 3d, 1894, to date.

N. T. Gorham & Son, 29 Summer street, Boston, appointed June 1st, 1894 to July 23, 1896.

Angus McDonald Peete, Galveston, Texas, appointed June 9th, 1894, to December 7th, 1895.

John L. Mills, Camden, New Jersey, appointed June 13th, 1894, to date.

The Columbian Iron Works and Dry Docks Company, Locust Point ship yard, Baltimore, appointed June 15th, 1894, to date.

The Harlan & Hollingsworth Co., Wilmington, Del., appointed October 8th, 1894, to date.

W. Thomas, Berkley, Va., appointed February 4th, 1895, to date.

Oscar Klocker, Seattle, Port Townsend, Washington Terr., appointed February 6th, 1895, to date.

The Puget Sound Dry Dock Company, Tacoma, Washington Terr., appointed February 6th, 1895, to date.

Capt. E. C. Warner, Tacoma, Washington Terr., appointed February 6th, 1895, to date.

H. G. Skinner, ship railway, Baltimore, appointed March, 1895, to February 6th, 1898.

The Portland Shipbuilding Company, Portland, Maine, appointed June 15th, 1895, to date.

427 The New England Co., Bath, Maine, appointed July 15th, 1895, to date.

Capt. E. D. Williams, harbor master, Wilmington, appointed November 4th, 1895, to date.

Franck M. Strachan, Savannah, Ga., appointed November 6th, 1895, to date.

H. Mosle & Company, Galveston, Texas, appointed December 7th, 1895, to date.

William M. Bird & Company, Charleston, S. C., appointed December 10th, 1895, to date.

Asa Baker & Son, 116 Border street, E. Boston, Mass., appointed December 16th, 1895, to date. Firm changed in 1899 to Baker, Rumney Painting Co.

Drew & Hazeltine, Jacksonville, Florida, appointed December 27th, 1895, to date.

Ollinger & Bruce, dry dock, Mobile, Ala., appointed December 27th, 1895, to date.

The New Jersey Dry Docks & Transportation Company, Elizabethport, New Jersey, appointed September 15th, 1896.

The Newport News Shipbuilding and Dry Docks Co., Newport News, appointed December 28th, 1896, to March 29th, 1897.

James E. Abbe, Newport News, appointed March 29th, 1897, to date.

W. Cramp & Sons, Philadelphia, appointed May 26th, 1897, to date.

Thomas Maxine Rly, Berkley, Va., appointed about 1898, to date.

F. Finkenhagen, ship-chandler, Baltimore, appointed January 26, 1898, to date.

Alfred Turner, Philadelphia, appointed about 1898, to 1899.

Cross-examination by Mr. MERWIN:

77 X Q. How long was A. C. Holzapfel agent for Suter Hartmann & Company?

A. I cannot state the year of the commencement of the
428 agency. When I joined A. C. Holzapfel in 1879 he was agent, and he continued to be agent until about the end of 1881.

78 X Q. State, if you know, the reason for the termination of the agency.

A. Mr. A. C. Holzapfel threw up the agency because, according to his idea, the Rahtjen composition which he received from Hartmann's did not contain the quantity of poisons, and, more particularly, mercurials, which was supposed to be contained in it.

79 X Q. What was the date of the taking of the photograph which you have introduced into evidence?

A. Some time in 1883, but the exact date I cannot state. It was paid for on August 24th, 1883, according to the receipt in our possession.

80 X Q. State, if you know, the reason for the taking of that photograph.

A. We wanted to keep a record of the markings of Rahtjen's composition previous to the taking out of their trade-mark.

81 X Q. For what purpose?

A. It was always anticipated at that time, and it was also threatened on the part of Hartmann's, that some legal proceedings would be taken against us in some shape or form, and we took the photograph in order to have a complete record as to the marks they then used.

82 X Q. So you kept possession of the packages in which you had bought Rahtjen's composition for some two years after the termination of the agency, and then photographed them in anticipation of litigation with your former principals?

A. They were not my principals.

83 X Q. The former principals of Mr. A. C. Holzapfel—is that the fact?

A. The barrels were taken over from the stock of Mr. A. C. Holzapfel, and they were kept by us until the photograph was taken. We found that the markings were getting somewhat dirty, and that if they were kept much longer they would be obliterated, and so we decided to have them photographed before we otherwise disposed of the goods.

429 84 X Q. If, as you say, you had a perfect legal right to manufacture and sell Rahtjen's compositions, why should you, from 1881 to 1883, be thus planning for litigation and anticipating suit by Suter, Hartmann & Company?

A. We were not planning for litigation. We were threatened with litigation, but the threats reached us in such a vague form that we could not possibly know whether litigation would be started, and, if started, in what form it would be started, and we only kept the record so that, if at any time any difficulty arose on the marking of the composition, we would be able to prove the marks as they were then.

85 X Q. When did you first commence manufacturing Rahtjen's composition?

A. In 1883.

86 X Q. What time of the year?

A. I believe it was May.

87 X Q. When were the threats of suit first made against you by Suter, Hartmann & Company?

A. As soon as ever we started in business.

88 X Q. Give me the date as near as you can.

A. About December, 1881, or January or February, 1882—within three months of our starting business.

89 X Q. What were you manufacturing from 1881 to May, 1883?

A. International composition.

90 X Q. Did Suter, Hartmann & Company threaten to sue you for the manufacture and selling of International composition?

A. No; the threats were that they would sue us for infringement of patent.

91 X Q. But you say the patent had expired or lapsed?

A. Not to my knowledge at that time.

92 X Q. At what time?

A. 1881–'2.

93 X Q. Were you manufacturing in 1881–'2 the International composition according to the formula of the patent to which you refer?

A. Of which patent?

94 X Q. There is only one patent, the Rathjen's patent?

430 A. No.

95 X Q. Then why were you threatened with a suit for infringement of a patent which it was known you were not using?

A. Because oxide of mercury was contained in fairly large quantities in the International composition, and it was supposed that oxide of mercury was the main support of the patent of Mr. Rahtjen.

96 X Q. Give the brands or the descriptive marks of the different compositions for ships' bottoms under which M. Holzapfel & Co. manufactured and sold from 1881 to 1883?

Objected to as immaterial and irrelevant, as to brands other than the "Rahtjen's" composition.

A. The "International" anti-fouling composition.

97 X Q. No other?

A. That was the only brand we made.

98 X Q. From May, 1883, down to the organization of the defendant company what brand or names of composition for ships' bottoms were manufactured and sold by M. Holzapfel & Co.?

Same objection as last repeated.

A. The "International" anti-fouling composition, "Rahtjen's" anti-fouling composition, "National" composition. At one time we also made a marine enamel, but it was discontinued.

99 X Q. How many different numbers or kinds of Rahtjen's composition sold by Suter, Hartmann & Co. were handled by A. C. Holzapfel during the time you were connected in business with him?

A. No. 1, No. 3 and No. 3*a*, I believe.

100 X Q. Those were different in composition, were they not?

A. The one was anti-corrosive and the others were anti-fouling.

431 101 X Q. Do you know what the difference in the formulas for manufacturing these different styles was?

A. I cannot speak as to Hartmann's, I can only speak as to our own.

102 X Q. How many different styles or numbers of Rahtjen's compositions were and have been manufactured by M. Holzapfel & Co. and the defendant company?

A. 1, 2 and 3.

103 X Q. These, of course, are different formulas?

A. No. 1 is only made as anti-corrosive. It was not marked Rahtjen's composition for the first few years, but No. 3 was, of course, marked according to the trade-mark which we took out for it.

104 X Q. How was No. 2 marked?

A. With two parallelograms instead of three; otherwise the same as No. 3.

105 X Q. Then, you had two styles or numbers of Rahtjen's composition, which from the first were labeled or marked "Rahtjen's" composition No. 2 and No. 3.

A. Yes.

106 X Q. When did you first give the name of Rahtjen's composition to No. 1—your anti-corrosive composition?

A. I should say it would be about three years after we first started to manufacture them.

107 X Q. About 1886?

A. About that time I should say; I would not be certain; unless I verified it first.

108 X Q. Has the firm of M. Holzapfel & Co., and later the defendant corporation, from the year 1886 to the present time sold in the United States these three different Rahtjen's compositions?

A. We only sold 1 and 3, not No. 2.

109 X Q. Which one of the three Rahtjen compositions manufactured by your firm or corporation has been made by the formula of the Rahtjen composition to which you have referred?

A. No. 3.

110 X Q. What is the earliest date at which you knew of
432 the sale of Rahtjen's composition by Suter, Hartmann & Co.?

A. Rahtjen's composition in 1883, and "Rahtjen's patent" composition since 1879—since I first entered A. C. Holzapfel's employ.

111 X Q. For what territorial district was A. C. Holzapfel agent for Suter, Hartmann & Company while you were connected in business with him?

A. At first for the Tyne district; Sunderland and Tees; and, later on the Sunderland and Tees district he transferred to one of his clerks.

112 X Q. Then the sales that you referred to in your previous testimony were the sales made in those districts?

A. Yes.

113 X Q. Had you at that time any knowledge of the sales by Suter, Hartmann & Company in the United States?

A. None whatever.

114 X Q. Had you any knowledge during the agency of A. C. Holzapfel of the way in which Suter, Hartmann & Company marked the packages containing Rahtjen's composition which were shipped to the United States by them?

Objected to by defendant's counsel, as assuming in the question, matters not yet proven in the case.

A. No.

115 X Q. Since 1891, how many and what brands of compositions for ships' bottoms has the defendant company sold or used in the United States?

Objected to as immaterial and irrelevant so far as relates to brands other than the one in the litigation.

A. We have sold the "International" brand, "Rahtjen" brand, and the "National" brand—all three.

433 116 X Q. Which is or has been your chief or leading brand of these compositions—that is, of which brands are the sales the largest?

Objected to as immaterial, irrelevant and incompetent.

A. The "International" brand.

117 X Q. You have in your advertisements and introduction of these compositions to the public made special effort to sell the International in preference to the others, have you not?

Same objection.

A. We have.

118 X Q. You have represented, have you not, that the International was superior to the Rahtjen composition?

Same objection.

A. Yes.

119 X Q. If the International, in fact, is and was superior to the Rahtjen composition, why did you engage in the manufacture and sale of so-called Rahtjen's composition, especially when you were threatened with suit by Suter Hartmann & Company, as you have testified?

A. As we had once started to manufacture the original brand, we did not want to give it up.

120 X Q. Why did you begin its manufacture?

A. Because (we are getting into a very controversial point) remarks were circulated by Suter Hartmann & Company and their agents that they would start proceedings against us for infringement of their patent; and that, as we were a small firm beginning, we would not be able to pay up, and, according to the law of this land, our customers would then have had to pay if a court had found in their favor and we were unable to pay. These remarks made
434 it at times almost impossible for me to sell the International composition. We then searched the register, and found that the Rathjen patent had expired. In order to show that these statements were groundless, we issued a circular that the patent had expired, and that we could in future also manufacture "Rahtjen's" composition if we wished.

121 X Q. Why did you wish to manufacture it?

A. For the reason I have just stated.

122 X Q. Was it not that you rather hoped, and endeavored thereby, to get the customers of Suter Hartmann for yourselves?

A. That was not our intention at all.

123 X Q. Did you intend to manufacture Rahtjen's compositions to sell to your customers who had been and were using International?

A. No; we did not intend to sell "Rahtjen's" compositions at all at first. We only issued this circular in order to demonstrate that we could sell it; but, by a printer's error, the word "Rahtjen" was misspelt, and Suter Hartmann & Company issued a circular leading the public to believe that the misspelling was done purposely, and that it was not our intention to sell Rahtjen's composition, and we then decided to manufacture and sell it, and push it against their brand of Rahtjen's.

124 X Q. You knew, did you not, before engaging in the business of manufacturing or selling Rahtjen's composition both in England

and the United States, that there was an established business in Rahtjen's compositions of Suter Hartmann & Company or the complainant company, and commenced to sell compositions under the same name for the purpose of getting some of their trade, did you not?

A. No, we sold our "Rahtjen's" as "Holzapfel's Rahtjen's" while Suter Hartmann sold their Rahtjen's as "Hartmann's Rahtjen, the red-hand brand." There was always a distinct difference shown between the two brands.

125 X Q. Before you manufactured at all and before Suter,
435 Hartmann & Co. ever marked with the red-hand brand, you knew, did you not, that there was an established business in Rahtjen's compositions in this country?

A. Yes.

126 X Q. Then when you engaged in the manufacture and sale of Rahtjen's composition you did it for a purpose, and that purpose was to get some of their trade away from Suter Hartmann & Co. was it not?

A. The purpose was to sell such of our goods as we could.

127 X Q. Please answer the question.

A. I have answered it.

129 X Q. Did you not intend and design and try to get from Suter Hartmann & Co. some of their trade by selling Rahtjen's composition?

A. We were trying all the time to take as much of their trade away as we could. There had been keen competition between us.

130 X Q. But you were manufacturing and selling what you claim and always have claimed to be a superior composition. What other purpose could you have had in manufacturing another brand of an inferior character except to get the trade of a competitor?

A. For certain trades we recommended the use of "Rahtjen's" composition, and certain people preferred a composition of the character of "Rahtjen's" composition, and then of course we recommended ours in competition with Hartmann's, for such people.

131 X Q. Who, to your knowledge first made known to the public the composition under the name of Rahtjen's composition? Was it not Suter, Hartmann & Company, or their predecessor John Rahtjen?

A. Yes; when I first came to this country there was only one Rahtjen composition, and that was sold by Suter, Hartmann & Company.

132 X Q. When you commenced selling Rahtjen's composition in the United States did you not know that Suter, Hartmann & Company had a trade established there in Rahtjen's composition, or were selling Rahtjen's composition in the United States?

436 A. I knew very little about the American trade when we first started our agency there. I had no knowledge as to the — of trade, and whether Hartmann's or any of the American manufacturers did the trade.

133 X Q. Did or did you not know that Suter, Hartmann & Com-

pany were selling Rahtjen's composition in the United States when you commenced selling under that brand there?

A. I did not.

134 X Q. Prior to 1883 how did you distinguish packages of International composition—the different numbers of 1, 2 or 3?

Objected to as immaterial and irrelevant.

A. I cannot remember that. I would have to verify it first.

135 X Q. When did you first mark any packages of anti-fouling composition with three parallel bars or columns?

A. I believe in 1883.

136 X Q. That mark had before that time been applied, had it not, by Suter Hartmann & Company to the packages of their anti-fouling Rahtjen's composition?

A. It had.

137 X Q. Why did you call the Rahtjen's composition which you commenced manufacturing in 1883 "genuine"?

A. Because we wanted to demonstrate that it was a genuine article made according to the patent.

138 X Q. Did you mean by that to inform the public that your manufacture was different from Suter Hartmann & Company's goods?

A. No; we only wanted to demonstrate that it was made according to the patent.

139 X Q. Did you, or did you not, know at that time that the goods sold by Suter Hartmann & Company were being manufactured on an improved formula and process as compared with the formula of the patent?

437 A. I first heard of the secret process of Rahtjen's composition in connection with a lawsuit between Hartmann and A. C. Holzapfel.

140 X Q. When was that suit?

A. I do not know the date. I cannot remember the year just now.

141 X Q. Was it while Mr. A. C. Holzapfel was agent for Hartmann & Company?

A. No; it arose out of giving up the agency—breach of contract.

142 X Q. How was there a breach of contract, if Mr. A. C. Holzapfel resigned the agency?

A. Because he was bound for a number of years to be the agent for Suter Hartmann & Company.

143 X Q. Was that the ground of the suit?

A. It was.

144 X Q. Was that the ground on which damages were awarded to Suter Hartmann & Company?

A. I believe so.

145 X Q. How many vessels of the royal navy have been coated by you with your Rahtjen's composition in the year 1898?

A. I cannot say that offhand.

146 X Q. Do you know how many vessels are now coated with your Rahtjen's composition in the royal navy?

A. No, I could not say without looking it up first.

147 X Q. Is the coating of the vessels which you have painted with Rahtjen's composition in the royal navy for regular service use or for experiment and test purposes?

A. In the royal navy they were for test purposes.

148 X Q. What is the price per hundredweight of your Rahtjen's composition in the United States?

A. I must speak from memory, but I believe it is sold at three dollars a gallon for the number I and four dollars a gallon for the number III.

149 X Q. How many gallons to the hundredweight?

438 A. About ten and a half or eleven gallons to the hundredweight—about eleven American gallons to the hundredweight.

150 X Q. Is the weight of No. I and No. III substantially the same?

A. Yes, substantially.

Redirect examination by Mr. McMASTER:

151 Re-D. Q. In your cross-examination I understand you to say that certain threats of suits were made against the firm of M. Holzapfel & Co. when they began to manufacture a composition for ships' bottoms. How were those threats made?

A. They were statements by third parties. None of them were made direct to us, as we were not on speaking terms with either the Hartmanns or their agents.

Defendant's counsel objects to all preceding testimony in regard to threats alleged to have been made by Suter Hartmann & Co. or their successors in business to third parties and by them communicated to defendants or their predecessors in business, as secondary and hearsay evidence, and therefore incompetent.

152 Re-D. Q. What is the common practice of manufacturers of compositions for ships' bottoms in regard to describing the grading of the different compositions employed by them in coating a ship's bottom?

Question objected to as not proper redirect examination.

A. All manufacturers make a priming and an anti-fouling composition. The priming or No. I coating is used as an isolating coating next to the metal, and is generally marked by a Roman I. The No. 2 or No. 3 or anti-fouling coating, is generally the article which has been the subject of patent, and it is marked mostly with a Roman II or Roman III to distinguish it as second or third coating.

439 153 Re-D. Q. Is that true of compositions for ships' bottoms made by manufacturers other than the complainant and the defendant companies in this suit?

A. That is so with almost all compositions that have come under my notice.

154 Re-D. Q. What, if any, is the difference between a No. II and a No. III anti-fouling composition?

A. The difference is in the quantity of poison contained in the two, No. III being a stronger paint than the No. II, and, in consequence, containing more poison.

155 Re-D. Q. The difference, then, is one of degree of strength merely?

A. Purely.

156 Re-D. Q. How does the extent of the defendant company's business compare with that of the business of other manufacturers of compositions for ships' bottoms?

Question objected to as incompetent and immaterial.

A. I believe that our business is materially larger than any other business of a similar nature in the world.

Recross-examination by Mr. MERWIN:

157 Re-X Q. Do you mean by your last answer that the business of the defendant company is larger than that of Suter, Hartmann and Rahtjen's Composition Company, Limited, and Rahtjen's American Composition Company?

A. Most decidedly.

Having read my depositions and before signing the same I desire to correct my answer to question 63. From an examination of the books, I am now able to give a detailed statement of the dates of sale and places in the United States to which the Rahtjen composition, as manufactured by Holzapfel & Co., or by the defendant company, was sent, together with the amounts of each shipment and the names of the consignees. They are as follows:

440

Statement of Rahtjen's Composition Sold in United States in 1883–1895.

1883.				
Nov'r 16.	S. S. Craigallion, New York	7 0 0		
				7 0 0
1884.				
July 29.	Woodward Wright & Co., New Orleans	40 0 0		
Sept. 3.	Mr. Jas. Perry, New York	5 2 0		
				45 2 0
1886.				
July 2.	Woodward Wright & Co., New Orleans	40 0 0		
				40 0 0
1888.				
Mar. 23.	Woodward Wright & Co., New Orleans	10 0 0		
				10 0 0
1889.				
July 27.	A. C. Dietz & Co., San Francisco	30 0 0		
				30 0 0
1890.				
Febr. 22.	Woodward Wright & Co., New Orleans	13 0 0		
June 16.	J. A. Donald, New York	40 0 0		
Aug. 14.	Do. do.	40 0 0		
" 19.	Do. do.	40 0 0		
				133 0 0

1891.					
Feb.	4.	J. A. Donald, New York	20 0 0		
"	6.	Do. do.	30 0 0		
"	12.	Woodward Wright & Co., New Orleans..	10 0 0		
Ap'l	1.	J. A. Donald, New York	20 0 0		
"	9.	Do. do.	20 0 0		
"	13.	Do. do.	20 0 0		
July	16.	Do. do.	40 0 0		
Sept.	26.	Do. do.	40 0 0		
Oct'r	12.	Do. do.	40 0 0		
Dec'r	28.	Do. do.	40 0 0		
					280 0 0
441					
1892.					
Janr.	6.	J. A. Donald, New York	40 0 0		
"	9.	Do. do.	40 0 0		
Febr.	2.	Woodward Wright & Co., New Orleans..	10 0 0		
Ap'l	23.	Do. do.	20 0 0		
			110 0 0		
1892.					
Ap'l	22.	J. A. Donald, New York	80 0 0		
July	19.	Do. do.	80 0 0		
Oct'r	28.	Do. do.	80 0 0		
Dec'r	30.	Woodward Wright & Co., New Orleans..	20 0 0		
Febr.	12.	Do. do.	10 0 0		
					380 0 0
1893.					
Jan.	19.	Woodward Wright & Co., New Orleans..	15 0 0		
Febr.	17.	J. A. Donald, New York	80 0 0		
Ap'l	10.	Woodward Wright & Co., New Orleans..	25 0 0		
June	10.	J. A. Donald, New York	80 0 0		
"	24.	Woodward Wright & Co., New Orleans..	17 2 0		
Aug.	14.	Do. do.	25 0 0		
Sep.	12.	J. A. Donald, New York	100 0 0		
Dec'r	27.	Do. do.	40 0 0		
					382 2 0
1894.					
Jan.	19.	Woodward Wright & Co., New Orleans..	25 0 0		
"	30.	Do. do.	20 0 0		
Feb.	15.	J. A. Donald, New York	40 0 0		
May.	9.	Holzapfel's Compo. Co., Limited, New York	80 0 0		
"	9.	Do. do.	40 0 0		
Sept.	11.	Do. do.	80 0 0		
Nov'r	21.	Do. do.	45 0 0		
Dec'r	10.	Do. do.	15 0 0		
					345 0 0

442

1895.

M'ch	7.	Holzapfel's Compo. Co., Limited, New York	.....	50 0 0
May	10.	Do.	do.....	20 0 0
June	8.	Do.	do.....	30 0 0
"	28.	Do.	do.....	40 0 0
July	24.	Do.	do.....	90 0 0
Nov'r	11.	Do.	do.....	200 0 0
Dec.	11.	Do.	do.....	60 0 0
				490 0 0

As to the first item, the shipment of November 16th, 1883, the composition was sent to steamship "Criagallion" at New York for the purpose of painting her there.

I wish to explain how the discrepancy arose between my present answer and the answer to question 63. In the quantities given for 1886, 20 hundredweight were included for St. Thomas, the clerk thinking that this was within the United States. In 1888 the difference arose through six hundredweight having been sent to Esquimault, the clerk thinking that was within the jurisdiction of the United States. In 1891, 1893, 1894 and 1895 the discrepancy arises through not regularly sending advice notes and not putting on consular invoices the brand of composition sent. Consequently, in order to verify it, I had to go through the current number books. The quantities given last in the previous statement were thought to be "International" composition, but the current number books disclosed them to have been "Rahtjen's" composition. The same explanation applies to the 1890 figures. Here also a few hundredweight were entered wrong, as an invoice was included in the quantities charged for composition taken out of the New York stock and invoiced and sold in Baltimore. From 1895 onwards, to 1898, all shipments to the United States were made to our New York house for distribution amongst the agencies; and since about the middle of 1898 the composition has been manufactured in the United States.

443 The list of agents in the United States having been produced by Mr. Max Holzapfel after his deposition had been taken as a whole, and as an answer to question 76, it being agreed by counsel that the answer to question 76 should be left until the final closing of the deposition, the cross-examination as to the same is made as original cross-examination without objection.

158 X Q. What do you mean by agent?

A. Agents are firms with whom we have arrangements for stocking our compositions and selling them against commission, or firms who buy the composition on their own account and sell it again on their own account.

159 X Q. Are all the parties which you have named in your answer to question 76 those who buy or have bought of you to sell and have sold to others?

A. No; I could not say that all of them have bought or sold our composition.

160 X Q. Then are such parties correctly termed your agents?

A. Yes. An agent may try to sell, and he may not succeed in selling.

161 X Q. Do you consider a man the agent of your company who buys for his own use only?

A. Yes; he is a buying agent.

162 X Q. How is he different from any other purchaser of your composition, then?

A. Because a buying agent gets a commission—gets goods on terms.

163 X Q. Do you mean that any one who purchases your composition and gets the discount, or gets terms thereby, becomes your agent as distinguished from a mere purchaser?

A. No.

164 X Q. Do you call a party your agent to whom you sell compositions for his own use, making him special terms or discounts, and where he does not sell to others?

441 A. If we sold to a ship-owner for his own use we would not call him an agent, but if we sold to a dry-dock company, who might possibly use the composition themselves, or who might sell it again, we would call them agents; we would call the dry-dock company agents.

M. HOLZAPFEL.

Sworn to before me, &c.

ALEXANDER RIDGEWAY,
Notary Public.

WILLIAM C. A. HOLZAPFEL, a witness produced on behalf of the defendant, having been duly sworn, testifies as follows:

1 Q. What is your name, residence and occupation?

A. My name is William C. A. Holzapfel; I am forty years old; I reside at 4 Lambton road, Newcastle-on-Tyne, and I am a steamship owner.

2 Q. Were you ever interested as an employee or otherwise in the sale or manufacture of any composition for ships' bottoms?

A. I was a partner in M. Holzapfel & Company, and later on a director in Holzapfel's Compositions Company, Ld.

3 Q. Prior to your connection with the firm of H. Holzapfel & Company in whose employment were you?

A. I was for a number of years in my brother A. C. Holzapfel's employment.

4 Q. At that time what was Mr. A. C. Holzapfel's business?

A. He was agent for Suter, Hartmann & Company in Newcastle and the district.

5 Q. What was the nature of the agency which A. C. Holzapfel had at that time?

A. He was agent for the sale of Rahtjen's composition supplied by Suter, Hartmann & Company.

445 6 Q. And those compositions were anti-fouling and anti-corrosive coatings for ships' bottoms.

A. Yes.

7 Q. When did you enter A. C. Holzapfel's employ, as near as you can fix the date?

A. It was about May, 1876.

8 Q. You remained in his employ how long?

A. I think it was 1879.

9 Q. During the time of your employment by A. C. Holzapfel what were your duties?

A. I was first in the office, and later on I looked after the application of the composition, and sometimes, of course, after the sale.

10 Q. Were you not familiar at that time with the markings which Suter, Hartmann & Company placed on the vessels containing the so-called Rahtjen's composition which was shipped to A. C. Holzapfel?

A. Yes.

11 Q. Do you remember the general character of the markings?

A. Yes; very well.

12 Q. How were they marked and what were the markings?

A. The priming was usually supplied in two-hundredweight barrels, with white ends and figures in black. One end was marked "S. H. & Co.," with a running number, and in the later years they sometimes marked the destination, and the port mark was put on it as well. On the opposite side there was a Roman figure I, "Priming" and "Stir well before using," below "Priming" in small letters. The other quality, No. III, the anti-fouling, was marked "S. H. & Co." and a running number, and then occasionally the port mark and on the opposite side a Roman figure III and "Stir well before using."

13 Q. What was the color of the ends of the barrels containing No. III? Was it the same as of the ends No. I?

A. No; black ends for the No. III.

14 Q. And what color were the figures and letters?

446 A. White figures and letters. They supplied other qualities, but it was only a rare occurrence. No. I and No. III were what was usually supplied.

15 Q. Look at the photograph now shown you, hereinbefore marked "Defendant's Exhibit Photograph of Barrel Heads," and state whether you identify that as a correct representation of anything, and, if so, of what?

A. That is a representation of the barrels, but there is no No. I. That had escaped my memory.

16 Q. It is a correct representation of what barrels?

A. The barrels that were supplied by Suter, Hartmann & Company to A. C. Holzapfel.

17 Q. The upper barrels represented in this photograph seem to be of smaller dimension than the lower barrels. Do you remember that?

A. They contain one hundredweight each.

18 Q. Do you know when that photograph was taken?

A. I remember the circumstances. It was taken in my presence.

19 Q. Do you remember who took it?

A. A man called Gray, in Gateshead.

20 Q. Do you know where Mr. Gray is now?

A. No; I do not.

21 Q. Look at this paper now shown you marked "Defendant's Exhibit Bill for 1883 Photograph," and state whether you ever saw that paper before today; and, if so, when first?

A. I think I saw it some time ago, but I would not see it when the invoice was made. I hardly think I would have seen it when it came. It would come to our office and then be sent on to the Quayside for payment.

22 Q. You are not positive that you ever saw that before?

A. I am not positive, except later on or recently. We never had another transaction with the firm of Gray Brothers. That is the only transaction we ever had with them.

23 Q. While you were with A. C. Holzapfel did he sell the composition which he received from Suter, Hartmann & Co., in
447 the barrels or casks in which he received it, or did he merely apply the composition to ships' bottoms?

Objected to as incompetent, irrelevant and immaterial.

A. He received a lump sum for painting the ship, and then he applied the composition; but, of course, he was the buying agent. He had to benefit or loose if the ship used more than the calculated quantity.

24 Q. In cases where the vessel was painted by A. C. Holzapfel with the said composition, where was the painting done?

A. In the various dry docks in the Tyne, or the district.

25 Q. In what vessels or receptacles was the composition delivered at the places where the ships were to be painted?

A. Usually the packages came to the docks as it was supplied by Suter, Hartmann & Co., and used as required, and sometimes it was kept in a store. It depended on the convenience of the yards. In some yards stocks were kept; sometimes it was even delivered at the goods station; it was kept at the goods station and delivered from there.

26 Q. Then, as I understand you, the composition was kept in the same casks in which it was delivered to A. C. Holzapfel by Suter, Hartmann & Co. until it was actually used in painting the vessels.

A. Yes.

27 Q. And those casks would then be on the dry dock where the vessel was painted?

A. Yes.

28 Q. Was any alteration or addition made by you, or A. C. Holzapfel, or any one in his employ, on the marks on the casks or barrels in which this composition was delivered at any time?

A. No, never.

29 Q. In case of a sale of composition, in what vessels was it sold?

448 A. It was applied direct to the ship.

30 Q. If he sold it, was it put in other barrels or other receptacles?

A. They might have taken half a hundredweight or so on board, sometimes for touching up, but then they would possibly put it in a vessel on board the ship. They would get it from the dock company and put it on their own vessel, if it were required for the voyage, but that was very seldom.

31 Q. Did not A. C. Holzapfel sometimes sell the composition and not apply it himself?

A. To some dry docks, he did that.

32 Q. In those cases where he sold the composition and did not apply it himself, or through his agents, to the vessels, in what receptacles was it sold?

A. As originally supplied.

33 Q. And with the same marks?

A. Exactly the same.

34 Q. As between Suter, Hartmann & Co. and A. C. Holzapfel how was the composition billed or invoiced?

A. It was invoiced at a certain price and he had two different discounts.

35 Q. Under what title or name, if any?

A. I think it was "Rahtjen's patent composition," but it is so long ago.

36 Q. What was meant, or what was the meaning of the term "Rahtjen's patent composition"?

A. My brother described it to the customers as a patent paint manufactured by Rahtjen when he sold it, and it was offered under that name to his customers.

37 Q. Did you understand at that time that it was covered by some patent?

A. Yes.

38 Q. Did you ever hear what patent?

A. No; I was told there was a patent in existence, and I heard that they threatened proceedings to one or two firms for infringement during the time I was with my brother.

39 Q. A patent in what country?

449 A. I think in England, and I believe on the continent, too, but I believe the proceedings were taken in England.

40 Q. I am asking you a patent in what country.

A. It was in England at the time, so far as I was acquainted.

41 Q. You remained in A. C. Holzapfel's employ down to about what time?

A. To about 1879.

42 Q. Then what did you do?

A. Then I was an engineer's apprentice—first with Thomas Clark & Company and then Robert Stevens & Company.

43 Q. You say that during the time you were in A. C. Holzapfel's employ the composition furnished by Suter, Hartmann & Company was billed or invoiced to him as Rahtjen's patent composition. Look

at invoices for 1877, 1878 and 1879, which I now hand you, and state if you can identify them; and, if so, as what?

A. This is the usual invoice A. C. Holzapfel received for the composition that Suter Hartmann supplied.

44 Q. Are these original invoices received by A. C. Holzapfel?

A. As far as I can see. Of course, the first is in the first name of the firm; the name of the firm was Hartmann & Company at first.

45 Q. When you went with A. C. Holzapfel the name was Hartmann & Company?

A. Yes.

46 Q. That was in 1877?

A. Yes; the partnership was dissolved, and it was changed to A. C. Holzapfel.

Defendant's counsel offers in evidence the three invoices shown to witness, and the same are now marked "Defendant's Exhibit Suter, Hartmann & Company's Invoices, 1877, 1878, and 1879."

47 Q. Look at the two papers now shown you, and state, if you can, what they are.

450 A. They are advices for composition forwarded.

48 Q. Advice notes from whom, and forwarded to whom, and under what dates?

A. After the composition had been ordered by my brother he received an advice from John Rahtjen that it had been forwarded, giving the numbers and details, and then, later on, sometimes about the same time, he received the invoice for the composition.

49 Q. And these are original letters of advice received about the time of the dates?

A. Yes.

Defendant's counsel offers in evidence the two papers about which the witness has just testified, and the same are marked "Defendant's Exhibit Advice Notes of 1878 and 1879 of John Rahtjen."

Objected to as being incompetent, irrelevant and immaterial.

50 Q. I asked you to describe the marks on the barrels or kegs containing the composition which Suter Hartmann & Company shipped to A. C. Holzapfel during the time of your employment by the latter—namely, from 1876 to 1879. That was asking you to carry your recollection back a long way. You described them substantially correct, but in the case of one head of the priming or first coating you described it as being marked No. 1. Since seeing the photograph of such kegs or barrels has your memory been refreshed as to this matter?

Objected to as leading.

A. Yes, I had in my mind some marks that were put on the barrels later on by M. Holzapfel & Company.

51 Q. Did the barrels or kegs received from Suter Hartmann & Company have a No. 1 on them?

A. No.

52 Q. In other respects, was the description which you have
451 given of the marks on the casks or barrels received from Suter Hartmann & Company between the dates 1876 and 1879 correct?

A. Yes.

53 Q. Did the word "Rahtjen" or the words "Rahtjen's composition" or "Rahtjen's patent composition" appear on any part of the kegs or barrels containing the composition received from Suter Hartmann & Company or John Rahtjen during the period you have mentioned?

A. No, I have never seen them.

Cross-examination by Mr. MERWIN:

54 X Q. During the period to which you have referred, from 1876 to 1879, when Hartmann & Company and A. C. Holzapfel & Company made sales of Rahtjen's composition, was it charged and billed to customers as Rahtjen's composition? You invoiced it as Rahtjen's composition?

A. "Rahtjen's patent composition."

55 X Q. And also when you coated vessels you charged for it or invoiced it under the contract as "Rahtjen's patent composition"?

A. "Rahtjen's patent composition," as supplied by contract.

WM. C. A. HOLZAPFEL.

Sworn to before me, &c.

ALEXANDER RIDGEWAY,
Notary Public.

452 FREDERICK SCHNITGER, witness produced on behalf of the defendants, having been first duly sworn, testifies as follows:

1 Q. What is your name, age and residence and occupation?

A. Frederick Schnitger; 50 years of age, residing at Newcastle-on-Tyne; a retired merchant.

2 Q. Have you ever been engaged in the manufacture or the sale of any composition for ships' bottoms; and, if so, state when first and under what circumstances?

A. First, as agent or clerk of Mr. A. C. Holzapfel, who was the agent of Suter, Hartmann & Company.

3 Q. When did you enter Mr. A. C. Holzapfel's employ?

A. Either the end of 1879 or the beginning of 1880.

4 Q. How long did you remain as clerk of Mr. A. C. Holzapfel?

A. When Messrs. M. Holzapfel & Company founded the new firm I remained over to transact the business for Mr. A. C. Holzapfel until his affairs were settled. After that I joined the firm of M. Holzapfel & Company. That would probably be in December, 1881.

5 Q. What was the character of the business carried on by A. C. Holzapfel while you were in his employ?

A. He was a buying agent, buying from Messrs. Suter, Hartmann & Company compositions for ships' bottoms, and selling them to dry docks, ship-owners, or taking a contract himself for the application and supply of the material.

6 Q. Where was A. C. Holzapfel's place of business?

A. Quayside at Newcastle-on-Tyne, and doing business in various ports in the neighborhood on the northeast coast district.

7 Q. Do you remember how the composition furnished by Suter, Hartmann & Company to A. C. Holzapfel was put up and marked?

A. Yes; I think so—generally in casks; very, very seldom
453 in drums. I think only once I saw a drum, and the casks for the priming composition were generally two-hundredweight casks. The anti-fouling composition was in one-hundredweight casks generally.

8 Q. How was the marking put on?

A. The marking was put on the end of the barrels; they were white ends on the first coating or priming composition, and black ends on the anti-fouling composition. The priming composition had black marks at either end; at one end was "S., H. & Co.," standing for Suter, Hartmann & Co., I presume. Then there was the running number, and very often a port mark, such as South Shields. The other end, which was white, had in black the marks "Priming" and "Stir well before using," in small letters. There were several kinds of anti-fouling composition. There was No. II, I believe; No. II*a* as well; No. III, and, I believe, a No. III*a*, too. They were marked on one side "S., H. & Co." in white letters on a black ground, with a running number and very frequently a port mark. On the other side there were Roman numeral- III, with dots between, and "Stir well before using," I believe, was there, too. On the No. II the figure III would not be employed, but a Roman numeral "II," and, in addition to that, if it was a No. II*a*, then the "*a*" would be added. If it were a No. III*a*, then, of course, the letter "*a*" would be added to the Roman figure III.

9 Q. The Nos. II, II*a*, or III or III*a*, represented what, as to the anti-fouling composition?

A. They represented a quality or degree of strength of the anti-fouling material, and indicated the price to be charged for the material. I am not quite sure about II*a*, but No. III*a* I am sure of.

10 Q. You are not sure that II*a* was used.

A. No; I am sure that one was marked "*a*." That was No. III*a*.

11 Q. Look at the photograph now shown you, heretofore marked "Defendant's Exhibit Photograph of Barrel Heads," and state if you identify that, and, if so, what it correctly represents.

454 A. This is a correct representation of 1, 2, 3 and 4 barrels of composition as supplied by Messrs. Suter, Hartmann & Company to Mr. A. C. Holzapfel. They appear to have been delivered to South Shields and they contained Rahtjen's composition as supplied to us.

12 Q. How do the markings on the barrel heads shown in this photograph compare or correspond with the markings on the barrels received from Suter, Hartmann & Company?

A. They are the markings as received.

13 Q. The lower or white ends of the barrels in the photograph represent the markings on what barrels?

A. On the priming, or first-coating barrels, number I composition.

14 Q. And the markings on the small barrels' heads above represent what?

A. The anti-fouling composition, the last coating, and that is of this kind the best quality—the dearest anyhow.

15 Q. Did you ever see such a photograph as that before today?

A. I was there when it was taken. It was taken by my instructions.

16 Q. Do you remember about when it was taken?

A. I can only fix that it was taken about that time when a certain lawsuit was fought by Messrs. Suter Hartmann & Company against Mr. A. C. Holzapfel, but I cannot fix the date any nearer than that. That is the only independent means I have of ascertaining the date.

17 Q. Look at the paper which I now show you, which has been heretofore marked in evidence "Defendant's Exhibit Bill for 1883 Photograph," and state, if you can, what that bill is and whether you ever saw it before?

A. This is the bill from the photographer who took that photograph for the work done by him on the occasion referred to.

455 18 Q. Does that help you in any way to fix the time when the photograph was taken?

A. It states August 24th, 1883. That is when the bill was paid, and it must have been previous to that when it was taken. I believe I paid it myself.

19 Q. Can you fix how long previous to the payment of that bill the photograph was taken?

A. Only speaking from memory, I may say that it would be a month or six weeks, possibly six weeks before that time that it was taken—in the neighborhood of that date. It would have been certainly after April, and of course it must have been before August.

20 Q. What were your duties while in the employ of A. C. Holzapfel?

A. To obtain orders and to see to the proper application of the material, likewise to receive the goods and check them over when they arrived, also to write letters in connection with it to the various agencies.

21 Q. Did the words "Rahtjen's composition" or "Rahtjen's patent composition," or any name or title of which the word "Rahtjen" formed part, appear on the casks or barrels containing the composition received by A. C. Holzapfel from Suter Hartmann & Company?

A. I have never seen the name of "Rahtjen" or "Rahtjen's patent composition" or anything like that on a barrel or any other vessel containing Rahtjen's composition as supplied by Suter, Hartmann & Co. during the time that I was with A. C. Holzapfel. I have seen it since, of course.

22 Q. Were any additions or alterations to the marking made on the barrels after they were received by A. C. Holzapfel from Suter, Hartmann & Company?

A. Certainly not, unless you take it as an alteration when we address a label to the steamship so and so and nail it on—simply an address label to mark the goods for a particular ship.

23 Q. Do you know where the photographer who made the photographs can now be found?

A. I do not.

456 24 Q. Have you made any efforts to ascertain where he can be found?

A. Yes, I have tried to find him.

25 Q. With what result?

A. The last I could hear of him was that he was employed by the Autotype Company here in London. I have tried every means to find him, without success. I have also applied to the people who used to supply him with material, without further result. I do not know what further steps to take. I tried to trace him through his wife.

26 Q. You say that in some instances A. C. Holzapfel applied the composition to the ship's bottom, and in other instances sold the composition to others for use. In what receptacles and under what marks was the composition used for either painting the ships' bottoms at the dry docks, or, in case of shipment, to purchasers from A. C. Holzapfel?

A. Invariably in the original packages, except it was a small quantity required for a captain to touch up a ship at a foreign port—say, a gallon or so, when that quantity would be delivered on board generally in the people's own vessel that they had for that purpose when any touching up was wanted, otherwise in the same packages as received from Suter Hartman & Co.

27 Q. And in case of shipment to somebody else?

A. Invariably in the original packages.

28 Q. How did the marks compare with the original marks?

A. There was absolutely no alteration.

29 Q. That condition or state of affairs continued throughout your employment by A. C. Holzapfel?

A. It did.

30 Q. As I understand you, when the firm of A. C. Holzapfel & Company was formed, you shortly after entered their employment?

A. No; I did not enter their employment. I became a partner with them; but later, not at the very first.

457 31 Q. When did you become a partner in the firm of M. Holzapfel & Company?

A. I should say a month or six weeks after the firm had been started, and that would bring you to some time before Christmas, 1881; between November and Christmas I should say, or between November and the end of the year.

32 Q. What was the character of the business carried on by M. Holzapfel & Co.?

A. Manufacturers and sellers of anti-fouling composition for ships' bottoms.

33 Q. Did you then at any time to your knowledge manufacture or sell a composition for ships' bottoms under the title of "Rahtjen's patent" composition, or any title of which the word Rahtjen formed a part?

Objected to as incompetent, irrelevant and immaterial.

A. In 1883 we manufactured a composition and sold it as "Rahtjen's composition," or words to that effect, or "Genuine 'Rahtjen's patent' composition;" but I think it was "Genuine Rahtjen's anti-fouling composition." That was the title under which it was sold. Before 1883 we manufactured nothing else but "International" composition. Subsequently we manufactured a marine enamel, and I believe a top dressing in connection with that.

34 Q. How did the firm of M. Holzapfel & Co., of which you were a partner, come to manufacture and sell a so-called Rahtjen composition?

Same objection.

A. We were threatened all round that Messrs. Hartmann would prosecute us for infringing their patent. It was repeated to us by our customers, who would not buy from us, but were afraid that they might have to pay the damage if we were not able to do so. When we found out that Messrs. Hartmann had no patent, and consequently could not prosecute or persecute us any longer, we
458 said to ourselves, "We will let the people know" because that was a complete answer to the allegation that they could prosecute us and our customers, and therefore we let our customers know that we could make "'Rahtjen's patent' composition."

35 Q. How did you find that there was no patent for the composition?

A. I instructed a solicitor to see how long the life of the patent was and the nature of the patent, and likewise to obtain a couple of copies, and the report he sent back was that the patent had lapsed owing to the non-payment of fees. The matter was of very great importance to us; therefore, I went to the Patent Office and verified the fact myself.

The foregoing answer is objected to as incompetent, irrelevant and immaterial, and all similar questions and answers will be likewise objected to.

36 Q. What patent have you been referring to?

A. The Heinrich Rahtjens patent for the manufacture of "'Rahtjen's patent' composition." It is an English patent of 1873.

37 Q. How did M. Holzapfel & Co. put up the "Genuine Rahtjen's composition" or "'Rahtjen's patent' composition" which they commenced to manufacture?

A. Generally in barrels for home use and in drums for export.

38 Q. Do you know how the composition was manufactured by M. Holzapfel & Co. at that time?

A. Yes; it was made according to the patent of Heinrich Rahtjen which you have referred to; the English patent of 1873; the lapsed patent.

39 Q. That is, M. Holzapfel & Co. followed the formula given in the specification of the Heinrich Rahtjen lapsed patent?

A. Yes, absolutely.

459 Complainant's counsel said that all this line of inquiry was subject to the same objection.

40 Q. Where did M. Holzapfel & Co. manufacture their so-called Rahtjen composition?

A. In Gateshead-upon-Tyne.

41 Q. Where did they use or sell it?

A. All over the world.

42 Q. How did M. Holzapfel & Co. make known to the trade or public that they were manufacturing a so-called Rahtjen composition?

A. Verbally, by circular and by advertisement.

43 Q. Did you have anything to do with the preparation or distribution of the circulars and so forth?

A. I think I drew up most of them, if not all, both circulars and advertisements.

Objected to except so far as it may apply to business done in the United States.

44 Q. Were you familiar with the letter-heads and bill-heads and so forth, used by M. Holzapfel & Company while you were with them?

A. I think I drew them all. I do not think I prepared the first one, but I am nearly sure I prepared all the others.

Objected to as incompetent, irrelevant and immaterial.

45 Q. Look at the papers consisting of circulars, bill-heads, letters, advertisements of all descriptions, notices to the trade and so forth, now shown you, and state if you know what they are.

A. I have examined these papers carefully and I drew all of them to the year 1887. The ones subsequent to that time, I do not think I had anything to do with. I left the firm in 1887. Most of them contain my own handwriting or a fac-simile.

460 Defendant's counsel offers in evidence the papers about which the witness has just testified, and the same were marked "Defendant's Exhibit Holzapfel & Company's Circulars, Advertisements, Letter-heads, etc."

Objected to by counsel for the complainant as incompetent, irrelevant and immaterial.

46 Q. What representation, if any, did the firm of M. Holzapfel & Company make to the public regarding the so-called Rahtjen composition, made and sold by them?

Same objection.

A. The representation was the same throughout as long as I had to do with it—that it was a genuine Rahtjen patent composition manufactured in accordance with the specification of Heinrich Rahtjen's patent.

47 Q. Was or was not any representation made to the public as to by whom the so-called Rahtjen's composition sold by M. Holzapfel & Company was manufactured?

Same objection.

A. The representation throughout was that this was a composition manufactured by Holzapfel & Company in strict accordance with the provisions of the Rahtjen's patent; in other words that it was genuine Rahtjen's patent composition, Holzapfel's manufacture.

48 Q. Now, as to the marking on the vessels containing the said composition which the firm of Holzapfel & Company made and sold, state whether or not the name Rahtjen or Rahtjen's composition, or words substantially to that effect, appeared anywhere thereon.

Same objection.

461 A. I drew up the first stencil plate on a sheet of paper in pencil and it certainly contained the word "Rahtjen," but whether it contained the words "Rahtjen's patent," I cannot say. The wording was "Genuine Rahtjen's composition," or "Genuine Rahtjen's patent anti-fouling composition for ships' bottoms."

49 Q. You are positive that it contained the word "Rahtjen"?

A. Certainly.

Same objection.

50 Q. Do you know whether at that time the vessels or receptacles containing the composition made or sold by Suter, Hartmann & Company, contained the word "Rahtjen"?

Same objection.

A. They did not contain it to my knowledge, previous to 1883. After that they did contain the word "Rahtjen."

51 Q. Was that after you or your firm had used the word "Rahtjen" on their receptacles or vessels?

Same objection.

A. We had used the word "Rahtjen" to my knowledge before Suter, Hartmann & Co.; that applies to Cardiff, Liverpool, and Newcastle, where I have been at the time, but how much before that I could not say.

52 Q. Do you know whether the firm of M. Holzapfel & Company, during your connection with it, ever sold any of the so-called Rahtjen composition in the United States?

A. I know we consigned some to one firm. That is all I know about that.

53 Q. Do you know the name of the firm?

A. I cannot tell you exactly—Woodward Wright, or White, or something like that.

54 Q. Do you remember when that was?

462 A. I should say it was the end of 1883, or the middle of the year 1883.

55 Q. Did you have anything to do with the sale or consignment of the said composition to agents or other parties in the United States?

A. At times I had. I had charge of the head office at times, and I was establishing new agencies, but I cannot remember but this particular shipment.

56 Q. Do you know of your own knowledge whether or not M. Holzapfel & Co. sold the so-called Rahtjen composition in the United States or to agents or consignees in the United States at subsequent times, but during your connection with the said firm?

A. Certainly, the shipments would appear on the export list, and the export list was always examined very carefully.

Objected to as not being evidence within the personal knowledge of the witness, and therefore incompetent as secondary and hearsay evidence.

57 Q. Did you ever have occasion to attend to any of the details connected with the shipment of any of this composition by Messrs. M. Holzapfel & Co. to the United States except on this one occasion in 1883?

A. I must surely have had, but I cannot recall specific instances. I believe I once shipped some by a Liverpool steamer which went to America, but whether it went to the United States or South America I cannot say. I have given instructions for shipments to be made, but it is impossible for me to say whether to the United States. I know shipments were made. They were made by steamer from Newcastle to the United States—New York. I remember that, but I could not give a specific instance.

58 Q. Do you remember whether or not this composition, which was consigned to or sold to parties in the United States by M. Holzapfel & Co. during your connection with that firm, was
463 marked with the word "Rahtjen," or with any title of which the word "Rahtjen" formed a part?

A. Certainly it was marked with the word "Rahtjen." It was marked "Genuine Rahtjen's composition," or "Genuine Rahtjen's anti-fouling composition for ships' bottoms." That was the first marking.

Adjourned by consent to 10.30 a. m., August 10th, to the same place.

AUGUST 10TH, 1899.

Met pursuant to adjournment.
Counsel present as before.

Examination of Mr. FREDERICK SCHNITGER resumed:

59 Q. State whether the business in Rahtjen's composition carried on by the firm of M. Holzapfel & Co. during your connection with that firm, increased or not from year to year.

Objected to as incompetent, irrelevant and immaterial.

A. The business increased. We sold Rahtjen's composition. We never sold any before, so it was bound to increase. We never made it our business to push Rahtjen's composition—never had the intention of doing so.

60 Q. Did the sales made by the firm, during your connection with it from the end of 1881 to 1887, increase or diminish from year to year in regard to the Rahtjen's composition?

Same objection.

A. There was no sale in 1881 because we did make it.
464 There was no sale in 1882 for the same reason. There were certain sales in 1883; what quantity I cannot tell you. It only applies to half a year anyhow.

61 Q. Did the sales increase from year to year?

A. They increased from year to year; from that period up to the time I left, the business was an increasing one. It increased very much against our will as far as I was concerned.

62 Q. What was the practice of the firm while you were with it, in regard to introducting into foreign countries the various compositions which they made during that period?

Same objection.

A. We ascertained the names of people who dealt in the article, or people likely to deal in it, and corresponded with them, and on occasion called, or caused other people to call upon them, and endeavor to come to terms with them to represent us the usual way in which business is introduced. We also shipped goods on consignment, in order to let the people test the quality of our goods, and by various other similar means, and, particularly by advertisements.

63 Q. How soon after commencing the manufacture of a composition did the firm of M. Holzapfel & Co. seek to introduce it into foreign countries?

Same objection.

A. Oh, immediately; as soon as our works were in proper order.

64 Q. And in introducing such compositions into foreign countries, under what names were they introduced?

Same objection.

A. I do not know what compositions you are referring to.
465 65 Q. I am referring to the general practice of M. Holzapfel & Co. in regard to any and all compositions manufactured by them during the time that you were connected with the firm. I want to know what was their general practice in regard to promptly introducing the articles made by them into foreign markets, and under what names they were introduced—whether under the same names that were applied to those respective articles in the home market, namely—England—or whether new names were adopted when they commenced to introduce any of the said articles in the foreign markets.

Same objection, and further objected to as leading.

A. There was no difference in the description of the article between the home market and the foreign. We introduced the first goods we sold as our own manufacture, naturally.

66 Q. Referring to the time that you continued in A. C. Holzapfel's employ, do you know how Suter, Hartmann & Co. invoiced or billed the compositions which they sold or consigned to A. C. Holzapfel?

Same objection.

A. They invoiced as "Rahtjen's patent" compositions.

67 Q. What was the meaning of Rahtjen's patent compositions, as used to describe the composition consigned or sold by Suter, Hartmann & Co. to A. C. Holzapfel?

Objected to as incompetent, irrelevant and immaterial, unless the capacity of the witness to testify on these points is first shown.

A. The composition manufactured according to the specification of Heinrich Rahtjen's patent—the English patent. As such we represented it.

466 68 Q. Was it so understood by the trade?

Same objection.

A. It was asked for as Rahtjen's patent, and supplied as Rahtjen's patent. I never heard of it being anything else in those days.

69 Q. From your familiarity with the business of selling this composition during the period that you were with A. C. Holzapfel, do you know whether or not the trade understood, from the representations made by Suter, Hartmann & Co. and by their agents, that the composition sold as Rahtjen's patent composition was covered by any letters patent or manufactured in accordance with any letters patent?

Objected to as irrelevant, immaterial and incompetent, and as calling for hearsay evidence.

A. If you mean by the trade the customers, then I say yes, certainly. I cannot speak as to the rest of the trade and manufacturers. I do not know about them.

70 Q. When did you discover that the Heinrich Rahtjen's English patent of 1873 had lapsed or been forfeited and become public property?

Objected to as incompetent, irrelevant and immaterial.

A. During the first six months of 1883.

71 Q. Was that before M. Holzapfel & Co. began to manufacture and sell a composition as Rahtjen's composition?

Same objection.

A. We had not thought of manufacturing Rahtjen's composition at a time previous to the discovery of the lapse of the patent.

72 Q. Do you know of your own knowledge whether or not
467 Suter, Hartmann & Co., the predecessors in business of the complainant, knew that your firm of M. Holzapfel & Co. had commenced to manufacture and were continuing to manufacture during your connection with said firm, a composition called "Rahtjen's composition" or "Rahtjen's patent composition," or *or* some title in which the word "Rahtjen" formed a part?

Same objection.

A. I caused a circular to be sent to the firm of Suter, Hartmann

& Co. to intimate to them that we intended to do so. Moreover, they had an agent in Newcastle, and that agent could easily ascertain for himself that information, and would be sure to do so.

The answer is further objected to as secondary evidence and hearsay in character.

73 Q. Look at the first part forming part of "Defendant's Exhibit Holzapfel & Co.'s Circular, Advertisements Letter-heads, etc.," and state whether or not, that is a copy, or substantially a copy, of the circular or notice which you say you sent to Suter, Hartmann & Company.

Objected to as incompetent, irrelevant and immaterial, and, further, as calling for secondary evidence.

A. This is a copy of the circular which I drew up and caused to be sent to Messrs. Suter, Hartmann & Company, as I stated before, and to which they made reference in an advertisement subsequently.

74 Q. You know of your own knowledge, then, that Suter, Hartmann & Co. knew that M. Holzapfel & Co. were to engage and continue in the manufacture of Rahtjen's composition in competition with them?

Objected to as incompetent, irrelevant and immaterial.

468 A. Our advertisements alone would tell them that. They must have known. It was impossible for them not to know. We took every possible means of intimating it to them and to the public.

75 Q. During your connection with the firm of M. Holzapfel & Co. did Suter, Hartmann & Co., or John Rahtjen, or any one else, commence proceedings or suit to compel M. Holzapfel & Co. to discontinue the use of the word "Rahtjen," or "Rahtjen's composition," or substantially any such words, or did they ever claim damages against them for using such words?

A. They did not claim nor obtain damages. But it was generally said they would do so.

76 Q. Did they ever bring any suit against Holzapfel & Co., your firm?

Same objection.

A. They never did.

77 Q. During the period of your connection with the firm of M. Holzapfel, how, if you know, did Suter, Hartmann & Co. advertise and publish to the trade and public their Rahtjen composition made by them?

Objected to as incompetent, irrelevant and immaterial.

A. They advertised it as "Rahtjen's anti-fouling composition;" "Genuine Rahtjen's anti-fouling composition;" "'Rahtjen's patent' composition," and particularly in connection with the trade-mark containing, in the centre, a hand and some words descriptive of the

article sold, and intimating that there was none genuine without that signature and hand—one or the other—I do not remember which now.

78 Q. What was the color of the hand, if you remember?

A. Red.

79 Q. Did they or not lay stress on the red hand as distinc-
469 tive of a composition manufactured by them and sold under the title of which the word "Rahtjen" formed part?

Same objection.

A. They laid stress upon the fact that none was genuine without it.

80 Q. And that none was of their manufacture without the red hand?

Same objection.

A. That was what they meant to imply, I presume. The hand was the distinctive title of their manufacture and the genuineness of their manufacture.

81 Q. During your connection with the firm of M. Holzapfel & Co. how did they manufacture the composition which they made and sold under the name of "Rahtjen's composition," or "'Rahtjen's patent' composition," or some title of which the word "Rahtjen" formed a part?

Same objection.

A. According to the specification of Heinrich Rahtjen's patent.

82 Q. And what was the reputation of the said composition made by M. Holzapfel & Co. during the period of your connection with that firm?

Same objection.

A. It had a very good reputation for the purpose for which it was used—to suit a special trade.

83 Q. Did you know, during your connection with Holzapfel & Co., whether or not manufacturers of compositions for ships' bottoms, other than Suter, Hartmann & Co., or M. Holzapfel & Co., manufactured and sold any composition for ships' bottoms under a title in which the word "Rahtjen" formed a part?

Same objection.

470 A. At Antwerp I saw a composition of other manufacturers than the two people you have mentioned. I think they traded under the name of some oil and color company, but I am not sure of the exact name. I have read of others in correspondence; I know there was some manufactured elsewhere.

84 Q. During your connection with the firm of M. Holzapfel & Co. did they claim any exclusive right to use the words "Rahtjen's composition," or "'Rahtjen's patent' composition," or any title in which the word "Rahtjen" might form part?

Same objection.

A. Certainly not. We did not claim the sole right to the user of the name; but we demanded the right of the user of it.

85 Q. That is, a right in common with others to use the name; is that what you mean?

Same objection.

A. Certainly. I mean that anybody who liked to manufacture Rahtjen's patent composition was entitled to do so, and he was entitled to use the name, as long as he made it according to the specification.

86 Q. Do you know whether Suter, Hartmann & Co., the predecessors in business of the complainant, ever claimed during that period the exclusive right to use the words "Rahtjen's composition," or "Rahtjen's patent composition" or substantially such words?

Same objection.

A. They claimed the user of the old title previous to 1875 in their trade-marks, which is tantamount to claiming the sole right. But we lodged a protest, and those trade-marks were withdrawn.

Answer further objected to as secondary evidence.

471 87 Q. Did John Rahtjen at any time during your connection with the firm of M. Holzapfel & Co. to your knowledge ever claim or attempt to register a trade-mark for any title in which the word "Rahtjen" forms part?

Same objection.

A. Yes; on two occasions.

88 Q. Was any protest against the grant of such registration filed to your knowledge, and, if so, by whom?

Same objection.

A. It was filed to my knowledge because I filed it with the assistance of a solicitor. My signature is upon it.

89 Q. In whose name was it filed?

Same objection.

A. It was filed in the name of the firm of M. Holzapfel & Co., I think in one instance with my individual signature under it as partner. I am not sure whether that applies to John Rahtjen. It also includes the firms of Holzapfel at other places.

90 Q. Look at the certified copy of papers now shown you and state whether they have reference to the applications of John Rahtjen and the opposition thereto to which you have referred.

Same objection.

A. Yes; these are the documents referred to and those to which I objected through the solicitors.

The defendant's counsel offers in evidence the two papers shown to witness, and the same are now marked respectively "Defendant's

Exhibit Certified Copy of the Record of the Application,
472 Opposition and Withdrawal of John Rahtjen, No. 32951 of 1883," and "Defendant's Exhibit Certified Copy of the Record of the Application, Opposition and Withdrawal of John Rahtjen, No. 32826 of 1883."

Both documents are objected to as incompetent, irrelevant and immaterial.

91 Q. Look at the document I now hand you and state what that is?

Same objection.

A. I recognize that as a certified copy of the application, opposition and withdrawal of Suter, Hartmann & Co. No. 32858 of 1883.

Defendant's counsel offers in evidence the paper just shown the witness, and the same is now marked "Defendant's Exhibit Certified Copy Application, Opposition and Withdrawal of Suter, Hartmann & Co., No. 32858 of 1883."

92 Q. Look at the paper now shown you and state if you know what it is?

Same objection.

A. This is a certified copy of an application for a trade-mark by Suter, Hartmann & Co., dated 1884, No. 34919. At the foot of it is the following disclaimer: "We do not claim the exclusive use of the words Rahtjen's patent composition for ships' bottoms, buoys, etc., directions, or any of such words, except as part of the combination constituting our trade-mark as represented annexed, and to which we claim exclusive right," and the certificate of the registration.

Defendant's counsel offers in evidence the paper just shown the witness, and the same is now marked "Defendant's Exhibit
473 Certified Copy Suter, Hartmann & Company's Application for Trade-mark, 34919 of 1884."

Same objection.

93 Q. Look at the paper now shown you and state if you know what that is?

Same objection.

A. It is a certified copy of an application made by Hartmann Brothers, of Billiter street, London, numbered 32194 of 1883, claiming a new mark—"genuine composition" with a space left for the name of the composition, I presume; a hand; the word "trade-mark," and "Hartmann's manufacture" below it. Then there is the certificate of registration.

Defendant's counsel offers in evidence the paper just shown the witness and the same is marked "Defendant's Exhibit Certified Copy Trade-mark to Hartmann Brothers, No. 32194, of 1883."

Same objection.

94 Q. Can you produce a copy of the English patent to Heinrich

Rahtjen, to which you have frequently referred during your previous testimony?

Same objection.

A. I produce such specification, to which is attached copy of the grant and extract from the register of patents.

Defendant's counsel offers in evidence copy of papers just produced by witness and the same are marked "Defendant's Exhibit Certified Copy English Patent to Heinrich Rahtjen, No. 3290 of 1873."

Same objection.

474 95 Q. You have referred, if I remember your testimony correctly, to certain trade-marks taken out by the firm of M. Holzapfel & Co. Can you produce copies of such trade-marks?

Same objection.

A. I produce certified copy of a registered trade-mark to Holzapfel & Co., of Liverpool, in which firm I was a partner, No. 32103 of 1883. At the bottom of the application is this note: "The applicants do not claim any right to the exclusive use in connection of the above goods of the name Rahtjen."

The defendant's counsel offers in evidence the papers last produced by the witness and same are marked "Defendant's Exhibit Certified Copy Holzapfel & Co.'s Trade-mark 32103 of 1883."

Same objection.

(Witness continues:) I also produce certified copy of trade-mark granted to Holzapfel & Co., London, in which *which* firm I was a partner, and numbered 57999 of 1886. A copy of disclaimer appears on the application as follows: "The applicants do not claim any right to exclusive or separate use of the name Rahtjen appearing upon the company's mark." That is signed by me on behalf of the firm.

Defendant's counsel offers in evidence the papers last produced by the witness and the same are marked "Defendant's Exhibit Certified Copy Holzapfel & Co.'s Trade-mark 57999 of 1886."

Same objection.

(Witness continues:) I also produced certified copy of an application made by Holzapfel & Co., Glasgow, of which firm I was a partner in the year 1886, No. 58000, containing a disclaimer as follows:

"The applicants do not claim any right to the exclusive or
475 separate use of the name Rahtjen appearing upon this mark."
That is signed by me on behalf of the firm.

Defendant's counsel offers in evidence the papers last produced by the witness and the same are marked "Defendant's Exhibit Certified Copy Holzapfel & Co.'s Trade-mark 58000 of 1886."

Same objection.

(Witness continues:) I also produce a certified copy of a trade-mark 58001 of 1886, granted to M. Holzapfel & Co., of Newcastle-on-Tyne, which contains a disclaimer as follows: "The applicants do

not claim any right to the exclusive or separate use of the name Rahtjen appearing upon this mark." It is signed by me as a partner.

Defendant's counsel offers in evidence the papers last produced by the witness, and the same are marked "Defendant's Exhibit Certified Copy Holzapfel & Co.'s Trade-mark 58001 of 1886."

(Witness continues:) I also produce certified copy of trade-mark granted to M. Holzapfel & Co., August 4th, 1887, No. 58002, the application therefor being filed October 23d, 1886, which contains a disclaimer as follows: "The applicants do not claim any right to the exclusive or separate use of the name Rahtjen appearing upon this mark."

Defendant's counsel offers in evidence the papers last produced by the witness, and the same are marked "Defendant's Exhibit Certified Copy Holzapfel & Co.'s Trade-mark 58002 of 1886."

96 Q. How was it, if you know of your own knowledge, that disclaimers to the exclusive right to the use of the words "Rahtjen's patent composition," or "Rahtjen's composition," or words substantially to that effect, were made by both Suter, Hartmann & Co. and Holzapfel & Co.?

476

Objected to as incompetent, irrelevant and immaterial, and as calling for a conclusion of law.

A. I called in connection with the trade-marks and objections, at various times upon the head official, in connection with registrations, and he pointed out to me that we had no right whatever nor anybody else, to the absolute use of the word Rahtjen and we must disclaim the absolute use thereof. Of course, I would not do that upon my own responsibility and returned. It was subsequently pointed out to me, and I understood from my own common sense, that having objected to the user under the old firm, and successfully so, we could not possibly claim it ourselves. That is why we withdrew it. Moreover, it was not our object at all to secure an absolute user, but a user; consequently, the disclaimer of it was of no importance to us.

The answer is further objected to because of its hearsay character.

97 Q. Did the registrar of trade-marks or the head of the trade-marks department require either or both parties to file disclaimers?

Objected to as incompetent, irrelevant and immaterial.

A. Yes; both. He informed me that nobody would get the exclusive use after the expiry of the patent.

98 Q. Was it a matter of knowledge at that time that the Heinrich Rahtjen patent of 1873 had expired?

Same objection.

A. I knew, of course, and I stated that to the registrar. The whole matter was debated.

477 99 Q. What connection in business or otherwise, if you know, had John Rahtjen to whom you have referred with Suter, Hartmann & Co.?

A. I do not think I have ever seen John Rahtjen in my life, and I do not know the circumstances except from reading papers or having it told me. I do not think I can reply to that.

100 Q. You do not know whether he was a manufacturer of the Rahtjen composition and supplied it to Suter, Hartmann & Co., or whether he was a predecessor of theirs in business?

A. I could not say from my own knowledge that he ever manufactured an ounce.

101 Q. What was it, if anything, that gave value to the name "Rahtjen" as a part of the title for such composition for ships' bottoms?

Objected to as incompetent, irrelevant and immaterial, and because it calls for evidence from a witness whose qualifications for giving the same have not previously been shown.

A. The word "patent" added to any article gives it a fixity whereby a man can know what he buys exactly. He may judge for himself whether a certain stuff is likely to suit his purpose or not, whilst with a proprietary article he has nothing at all to do with that; he simply buys the name and swears by the maker. There is, besides, that greater regularity to be looked for in an ordinary way from a patented article which is circumscribed within certain forms than from the other article. The word "patent" has also an attraction for many buyers. The fact that Rahtjen's was a patent gave it the value.

102 Q. I do not remember whether I have asked you before or not, but you may now state whether or not, during the whole time of your connection with the firm of M. Holzapfel & Co., they manufactured the said composition under the specification of Rahtjen's patent of 1873, and always marked it "Rahtjen's composi-
478 tion" or "Rahtjen's patent composition," or words substantially to that effect?

Objected to as incompetent, irrelevant and immaterial, and as leading in character.

A. Most certainly we always manufactured the said composition according to Heinrich Rahtjen's specification, and always marked it with a title containing the word "Rahtjen."

103 Q. When did your connection with the firm of M. Holzapfel & Co. or Holzapfel & Co. cease?

Objected to as incompetent, irrelevant and immaterial.

A. In June, 1887.

104 Q. Have you any interest in the business of manufacturing and selling any composition for ships' bottoms at the present time?

A. I have not any.

105 Q. I presume you have not had since your connection with the firm of Holzapfel & Co.?

A. I have not. I am precluded from having any by agreement.

Cross-examination by Mr. MERWIN:

106 X Q. The business of A. C. Holzapfel while you were connected with him, was that of sales agent for Suter, Hartmann & Co., was it not?

A. I call it buying agent.

107 X Q. He also sold, did he not?

A. Yes, he sold.

108 X Q. And the usual way of selling Rahtjen's composition furnished him by Suter, Hartmann & Co. was applying the same to vessels under contract, was it not?

A. The greatest majority of the cases would be vessels under
479 contract, but there was certainly a considerable quantity of goods supplied to dry-dock people and on board ships.

109 X Q. His sales, however, were confined to the district in which he was agent, I suppose?

A. A ship might take it abroad to another port but a ship would be supplied in that port.

110 X Q. I notice in some of the advertisements which you have identified and which have been put in evidence the following words as applied to International anti-fouling composition "Colour and appearance similar to 'Rahtjen's composition;' but the International is much stronger and more effective as an anti-fouler." It was the uniform course of M. Holzapfel & Company to thus specially recommend and endeavor to make sale of International composition rather than "Rahtjen's composition" as far as possible, was it not?

A. In all circumstances we would sell "International composition" to our customers if we could possibly do so. It was the strongest anti-fouler. I believed it then and I believe it now.

111 X Q. During the time that you were connected with that business were the sales of "International composition" larger than the "Rahtjen composition" manufactured by you?

A. Certainly.

112 X Q. Were the sales of "International composition" by M. Holzapfel & Company in the United States during the time in which you were connected with them larger than the sales of "Rahtjen's composition" manufactured by you?

A. I could not tell you.

113 X Q. The firm of M. Holzapfel & Company were engaged in the manufacture and sale of "International composition" before they commenced the manufacture and sale of "Rahtjen's composition," were they not?

A. That is so.

114 X Q. Why did that firm then engage in the manufact-
480 ure and sale of what they regarded and advertised as an inferior article to that which they had been manufacturing and selling?

A. We advertised and engaged in the manufacture of Rahtjen's composition simply to demonstrate to our customers that it was without the power of Messrs. Hartmann & Company to stop us, inasmuch as they had not a patent themselves and that we could make Rahtjen's patent composition ourselves.

115 X Q. Was it not for the purpose of securing to yourself some of the trade which Suter, Hartmann & Company already had?

A. Why should we not? It was an open matter. Rahtjen's patent composition was there for anybody to make. Why should we not make it?

117 X Q. You, therefore, endeavored to get the benefit of the trade, whatever it might be which Hartmann & Company had established, and to get from them as far as possible their customers for Rahtjen's composition?

A. We never pushed the sale of Rahtjen's composition, always the sale of International composition under all circumstances. We only sold Rahtjen's composition when we could not sell the International.

117 X Q. When you commenced business in the manufacture and sale of Rahtjen's compositions, the only people then using compositions of that name were the customers of Suter, Hartmann & Company, were they not?

A. I can have no knowledge, except on the northeast coast district.

118 X Q. At that time did you know of anybody else than Suter, Hartmann & Company selling Rahtjen's compositions?

A. I presume John Rahtjen did.

119 X Q. Do you know?

A. No, except from the invoice heads, or advice notes that came from him, but I do not know whether he sold it to Hartmann or gave it away or what arrangement there was or partnership: I know nothing at all about it.

481 120 X Q. Did you make a less price on Rahtjen's composition than the price made by Suter, Hartmann & Company?

A. We might lose by a ship on a contract, but otherwise we should get a profit on the transaction.

121 X Q. Was the price of Rahtjen's composition manufactured and sold by Holzapfel & Company less than the price of Suter, Hartmann & Company's at the time you were with M. Holzapfel & Company?

A. Our list price was less than theirs.

122 X Q. Prior to the time when the patent to Heinrich Rahtjen lapsed as you have testified, you knew, did you not, that the exclusive right to use that patent belonged to Suter, Hartmann & Company in England?

A. To the best of my belief that is so. I do not know further than that.

123 X Q. Did you not know that before that patent the name of "Rahtjen's compositions" as a trade name was known to the trade in England?

A. I could not know that. I did not know anything about the business prior to 1873 or 1874, as prior to that time I was in the em-

ployment of a timber merchant. The only thing I knew about Rahtjen's compositions previous to coming to Newcastle in 1879 was when Mr. Ledoux in Liverpool offered me a position in connection with it, which I declined.

124 X Q. I notice in the printed matter which is in evidence of earlier date than 1888, that the name of Rahtjen's composition as advertised by your firm is without the word "patent;" if you wished to advise the public that what you were manufacturing and selling at that time was made under the formula of a patent, and that that was the fact which you emphasized to the trade, why did you during those years omit the word "patent" from the title?

A. Because we held the opinion that you cannot employ the word "patent" in connection with an article where the patent has expired. To serve our purpose we added underneath the advertisement
482 "Guaranteed to have been made in strict accordance with Rahtjen's specifications."

125 X Q. Is it not, and has it not been, common and usual in trade circles in England to call proprietary articles and compositions "patented" or "patent" for the sake of that name when there has been no patent whatever upon them?

A. I certainly should not say it was common to do so. An ignorant man might do it. But I should not think a man in drawing up a circular would do so.

126 X Q. Do you know as to any such custom in Germany?

A. No; I never heard of it.

127 X Q. How is it that you remember with so much distinctness and positiveness as to the exact marking of the casks containing Rahtjen's composition which Suter, Hartmann & Co. furnished to A. C. Holzapfel 20 years ago?

A. I had the photographs of those casks in my own personal custody from the time that they were delivered to me until about four months ago. I had them in a box which contains the deeds of partnership and dissolution, and so on, to which I constantly refer.

128 X Q. Then, when you testified as to this patent you relied upon the photograph, and not upon your own individual independent memory, did you not?

A. No. A photograph may remind you of a thing, but it does not say you have forgotten it altogether.

129 X Q. How do you know that there were not other casks than those shown in the photograph with different or additional marks upon them?

A. I have said that there were different casks.

130 X Q. How do you know of your own knowledge and memory that there were not casks furnished by Suter, Hartmann & Co. to A. C. Holzapfel, which had the name of Rahtjen's composition upon them?

A. I can only say I have not seen them.

131 X Q. Do you positively swear now that you never saw any such?

483 A. During the time I was with Holzapfel I certainly swear so positively.

132 X Q. How do you know it?

A. Because I would have remembered it. They would have been different from the casks we were accustomed to receive.

133 X Q. You have no other means of now knowing as to this fact than your memory?

A. No other means.

134 X Q. During the time you were connected with Holzapfel, how many different kinds of Rahtjen's composition did Suter, Hartmann & Co. furnish to him?

A. My recollection is not clear as to No. II*a*, but it is clear as to No. III*a*. I would, therefore, say four different kinds, of which I have personal knowledge.

135 X Q. Which one of those four do you understand was manufactured according to the formula of the Rahtjen English patent?

A. No. III certainly, and No. III*a*.

136 X Q. Were No. III and No. III*a* the same?

A. No; they were not the same. There was a slight difference in the quantity of anti-fouling materials used. The one was not as strong as the other.

137 X Q. Then both could not have been made under the formula of the patent? Which one was?

A. The formula permits some slight deviation.

138 X Q. No. I was not, was it, made under the formula of the patent?

A. No; the formula for No. I is not specifically contained in the patent.

139 X Q. Was the formula of No. II contained in the patent?

A. I take that to be within the radius of the alterations permitted by the patent.

140 X Q. Before the firm of M. Holzapfel & Co. commenced the manufacture of so-called Rahtjen's compositions, did you know, or had you been informed, that the formulas by which the Rahtjen's compositions sold by Suter, Hartmann & Co. had been manu-
484 factured were secret and different from the formula of the patent?

A. I never heard of it until 1883 under any circumstances, and then I heard it the first time from a statement from Suter, Hartmann & Co's counsel.

141 X Q. Was that statement before your firm commenced manufacturing compositions or after?

A. You are driving me two days to do that and I could not do it; it was within the same month that we started manufacturing. It was in the early part of 1883, and we started in the early part of 1883.

142 X Q. Then, about the time when your firm commenced manufacturing Rahtjen's compositions, you were advised that the formulas used in the manufacture of the Rahtjen's compositions sold by Suter, Hartmann & Co. were different and were secret?

A. Yes. About that time I heard it in court, to my very great surprise, in the statement from counsel.

143 X Q. Then, when in after years, your firm were engaged in

the manufacture and sale of Rahtjen's compositions, you knew that you were furnishing different compositions from what Sater, Hartmann & Co. were furnishing under the same name; did you not?

A. I did not, because I did not believe the statement.

144 X Q. You knew that it was claimed by Suter, Hartmann & Co. that there was a difference, did you not?

A. I did know that it was claimed, but I did not believe it.

145 X Q. You have spoken in your previous testimony of the sales of Rahtjen's composition by your firm being pressed against your wishes, or something to that effect. Why, if that was a fact, did you in your advertising matter make it prominent and lay so much stress upon the Rahtjen's composition of your manufacture?

A. The fact that we could sell Rahtjen's composition and not be
485 stopped by Suter, Hartmann & Co. was the best proof in the world for us to show our customers that Suter, Hartmann & Co. could not interfere with us in the manufacture of either composition, as it was alleged that they were going to do or about to do. It has never been pressed against my wishes. I say it was not our intention to press the sale of Rahtjen's composition. We would never press Rahtjen's composition if we could sell International.

146 X Q. Was it not the intention, however, and was it not the fact, that you made the effort not only in advertising, but in the general conduct of the business of M. Holzapfel & Co., to secure for your firm the previous customers of Suter, Hartmann & Co. and to induce them to take your Rahtjen's composition instead of theirs?

A. It was our endeavor always and at all times to sell our goods to our customers—our International composition—if we possibly could, and, failing that, Rahtjen's composition. That has always been our endeavor.

147 X Q. Then, if there was a customer who had used and desired to continue to use Suter, Hartmann & Co.'s Rahtjen's composition, you endeavored to get him as your customer for your Rahtjen's composition?

A. I would certainly not offer to him Suter, Hartmann's composition, but our own. I think that is patent enough.

148 X Q. While you were connected with A. C. Holzapfel in his agency for Suter, Hartmann & Co., did not the trade and your customers, in asking for and buying Rahtjen's compositions, understand that they were the goods furnished by Suter, Hartmann & Co.?

A. Yes. It was well known that Suter, Hartmann were the people connected with it.

149 X Q. How did they inquire for it? Did they ask for Rahtjen's compositions, or did they ask for compositions which were made in strict accordance with the Rahtjen patent?

A. They asked for Rahtjen's patent composition.

486 150 X Q. Were not these compositions known to the trade as those sold by Suter, Hartmann & Co., rather than compositions made by anybody, simply under the formula of the patent? In other words, did not the trade seek for the goods of this particular manufacture?

A. The ordinary mode in which these goods were described was

"Rahtjen's patent composition." It is impossible for me to say it was never done in any other way.

151 X Q. They were described, however, as coming from Suter Hartmann & Co.?

A. There was no necessity for it; there was no other as far as I know.

152 X Q. Then they were known to the trade as being furnished by Suter, Hartmann & Co.

A. As far as I know there was nobody else; this was Hartmann's composition, and the only place you could buy it from was A. C. Holzapfel's on the quay side as far as the northeast district was concerned.

153 X Q. When to your knowledge did any of your customers first ask of you if the goods manufactured by M. Holzapfel & Co. were in accordance with the patent?

A. Within a month or so from our beginning to manufacture, certainly quite early.

154 X Q. What was the reason for their asking you that question?

A. Because Hartmann had issued a circular stating that ours were not genuine, or that we were making an attempt to deceive the people by pushing something else onto them.

155 X Q. Did your customers ask you if the compositions you sold were the same as Suter, Hartmann & Co.'s?

A. They could not be the same. Two goods cannot be the same that are manufactured by different people.

156 X Q. Did they ask you if they were the same in quality and character—the same thing?

A. They asked me if it was the genuine Rahtjen's patent composition.

487 157 X Q. Did they ask you if it was the same thing as that?

A. I cannot say whether they did that; they asked me whether it was Rahtjen's patent composition, and I told them yes.

158 X Q. Did you ever represent, or was it ever represented to your knowledge by M. Holzapfel & Co., that the Rahtjen's patent compositions which that firm made and sold were the same or substantially the same as Suter, Hartmann & Co.'s?

A. We could not do that. How did we know what they did make. We had no evidence what they made. We only knew what we made ourselves.

159 X Q. Is that because you now believe their statements that they were manufacturing by different and secret processes from what you were doing?

A. I do not believe now that they then did it, but I believe now that they now do it, because they have changed the name.

160 X Q. What did you understand customers to mean when they asked you if your compositions were genuine? Did you not understand them to mean to ask if they were the same as what had before been sold by A. C. Holzapfel coming from Suter, Hartmann & Co.?

A. I understood them to mean genuine Rahtjen's patent composition, and I believe that the compositions supplied by Suter Hart-

mann & Co. was genuine Rahtjen patent compositions or I would not have sold it as such.

161 X Q. Then you understood customers, when inquiring for your goods and asking if they were genuine, to mean whether they were the same as Suter, Hartmann & Co.'s?

A. No; I understood them to mean whether they were made according to Heinrich Rahtjen's specification.

162 X Q. But you understood that Suter, Hartmann & Co.'s compositions were made according to that formula; did you not?

A. Certainly I did.

488 163 X Q. Then your customers when asking for the genuine must have meant that the composition you were manufacturing was the same as Suter, Hartman & Co.'s.

A. That would follow from your logic. What else could it be? It is Heinrich Rahtjen's patent. The one specification is the one thing.

164 X Q. Then I understand you now to admit that what customers meant in asking if your goods were genuine, was, whether they were substantially the same as what they had before, bought coming from Suter, Hartman & Co.?

A. I simply say in reply to that, that they meant to ask whether these goods were manufactured in accordance with Heinrich Rahtjen's specification.

165 X Q. (Question 164 X Q. repeated.)

Defendant's counsel objects to this whole line of cross-examination as purely argumentative, and the attention of the court is called to the fact that the witness has fairly and honestly answered the questions as put to him.

166 X Q. (Question 164 X Q. repeated.)

A. I can only reply to all that, that I understood them to mean whether we had manufactured our goods in accordance with Heinrich Rahtjen's specification.

167 X Q. You are an intelligent man and you certainly know what I mean by that question, and you certainly can answer it clearly if you choose. Will you please now listen to the question once more and answer it.

Same objection.

168 X Q. (Question 164 X Q. repeated.)

A. I can only repeat what I have said before. I believe up to that time that I heard it in court that Suter, Hartmann's was made according to Rahtjen's specification. My customers referred
489 to Heinrich Rahtjen's specification, and nothing else. I knew of no other paint called Rahtjen's composition.

169 X Q. Do you believe that one of such customers, if you had told him that the compositions which you were selling were different from those which had been sold by Suter, Hartmann & Co., would have purchased of you instead of from Suter, Hartmann & Co.?

A. I could not give you a reply to a purely hypothetical case like that.

170 X Q. Did you ever know of a customer, before M. Holzapfel

& Co. commenced manufacturing Rahtjen's composition, asking whether the Rahtjen compositions had been made in accordance with the patent or not?

A. It may have been possible.

171 X Q. Do you remember any such case?

A. Some people had the patent lying on their desks.

172 X Q. Do you remember any such instance?

A. I do not think I would pledge myself to remembering one.

173 X Q. Is it not the fact that the first time that customers made any inquiry or showed any interest about the formula of the patent was when your firm commenced to manufacture Rahtjen's compositions, and that customers then endeavored to learn from you if you were manufacturing the same article at a less price than Suter, Hartmann & Co. were selling it?

A. I think that many of the ships' husbands took an interest in the specification before that, and long before that, and had a copy of the patent and specification before them—at least I will say some had—and that when we started the manufacture of Rahtjen's patent composition there would naturally be every inquiry into the matter, and very anxious inquiry by some of them, why Hartmann had allowed the patent to lapse. All I did was to convince them that it had lapsed, and that we had as good a right to manufacture as Suter, Hartmann & Co. according to Heinrich Rahtjen's specification, and that we did do so.

490 174 X Q. Did you not intend to, and did you not as a fact, convey the idea to your customers, consequently, that the goods you manufactured were substantially the same as Suter, Hartmann & Company's?

A. I conveyed to my customers that I manufactured Heinrich Rahtjen's composition according to the specification.

175 X Q. (174 X Q. repeated.)

A. I conveyed to my customers, purely and simply, that the goods I sold were manufactured according to Heinrich Rahtjen's specification.

176 X Q. Do you decline to answer the question as put to you?

A. Not at all.

177 X Q. (174 X Q. repeated.)

A. How could I know in those days what Suter, Hartmann & Company manufactured? I could not possibly know it, and I could not convey it. I was not agent to Messrs. Suter, Hartmann & Company.

178 X Q. Whatever your answer was to customers, do you not think that it was probable that they understood from you that the goods you manufactured were substantially the same as what they had previously bought from Suter, Hartmann & Company?

A. To this effect, that they all previously believed that Suter, Hartmann & Co.'s composition was Heinrich Rahtjen's patent, and made accordingly, as everybody else did.

FRED. SCHNITGER.

Sworn to before me, etc.

ALEXANDER RIDGEWAY,
Notary Public.

GEORGE NICHOLL, a witness called on behalf of the defendants, having been first duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

491 A. I am George Nicholl, of Belgrade house, Meynell road, Hackney; manager for the London Graving Dock Company; my age is 60.

2 Q. How long have you been manager for the London Graving Dock Company?

A. Eight years.

3 Q. Before that what was your occupation?

A. I was marine superintendent for Messrs. Adam & Co.

4 Q. How long were you in that position?

A. A little over fourteen years.

5 Q. Where was their business carried on?

A. Their principal office was in Aberdeen, and they had an office in Newcastle and one in London.

6 Q. In which office were you in those days?

A. I lived in Newcastle, but I had to go as I was wanted to each office.

7 Q. While you were marine superintendent for Messrs. Adam & Co. state whether or not you had occasion to purchase or use any composition for ships' bottoms?

Objected to as incompetent, irrelevant, and immaterial.

A. Yes; we used patent compositions on all ships.

8 Q. Who did you purchase the composition from?

Same objection.

A. Principally Mr. A. C. Holzapfel.

9 Q. Was that while Mr. Holzapfel was an agent for Suter, Hartmann & Co. in Newcastle?

Same objection.

A. Yes.

10 Q. Do you remember what composition you used to purchase from Mr. A. C. Holzapfel?

Same objection.

492 A. It was called "Rahtjen's composition."

11 Q. Did you understand in those days it was a patent composition manufactured in accordance with any letters patent?

Same objection.

A. Yes; that was the understanding. I may mention that the agent gave that as a reason for the prices being higher.

12 Q. Do you remember when M. Holzapfel & Co. commenced to manufacture "Rahtjen's composition" for ships' bottoms?

Same objection.

A. Yes; I remember it well, but I could not give the date.

13 Q. How did you understand that M. Holzapfel & Company

could make "Rahtjen's composition" when they began to make and sell it?

Same objection, and, further, that the question is leading.

A. Simply that they assured us that they could make a composition equally as good as "Rahtjen's."

14 Q. Do you remember whether or not they stated that they made it under the Rahtjen patent which had expired or become forfeited?

Same objection.

A. At that time we were told by several people that the patent had expired. I should say this would be about four or five years after I joined Adam & Co., but up to that time there was no question that I remember of the composition being made except under the patent.

15 Q. Look at the circular, being the first paper of "Defend-
493 ant's Exhibit Holzapfel & Co.'s Circulars, Advertisements, Letter-heads, etc." and state whether you remember ever having seen such a circular as that before.

Same objection.

A. Yes, I have seen this circular, or one similar to this, at the time. I remember there was a circular sent to our office regarding this. Whether this is a copy of it or not I do not know, but there was a circular.

16 Q. Did you ever purchase any of the "Rahtjen's composition" manufactured and sold by M. Holzapfel & Co.?

Same objection.

A. No.

Cross-examination by Mr. MERWIN:

17 X Q. From the representations made to you, as you have stated, and from the circular which you saw, you understood then, I suppose, that M. Holzapfel & Company had decided to go into the manufacture of the same goods as Suter, Hartmann & Company had been manufacturing, claiming the right to do it?

A. Yes. I have a distinct recollection of Mr. Holzapfel assuring me that the International was quite as good as the Rahtjen patent that he formerly supplied, but I cannot say whether he said it was made from Rahtjen's specification or not. My memory does not serve me. I remember having a conversation with Mr. Holzapfel when he stated that they were going to make a composition in accordance with Rahtjen's specification.

18 X Q. You understood from him then, did you not, that the goods they were intending to manufacture were the same as were being manufactured by Suter, Hartmann & Company as Rahtjen's compositions?

A. I do not think I can add to my last answer beyond this:
494 That he had got the specification and was to manufacture it in accordance with Rahtjen's specification, and at that time it was mentioned that the patent had expired. I think it was about that time.

19 X Q. You had understood before that, had you not, that Suter, Hartmann & Company's Rahtjen's compositions were made under that patent?

A. Yes, under that patent.

20 X Q. Then you understood, did you not, that when M. Holzapfel & Company started to manufacture Rahtjen's composition they were making the same thing as Suter, Hartmann & Company, or were manufacturing according to the formula of the same patent?

A. Yes, to the best of my recollection that is so.

21 X Q. Was it not at the time understood by you and others generally that M. Holzapfel & Company had entered into the field in competition with Suter, Hartmann & Company, and were manufacturing and selling substantially the same article on the ground that the patent had expired, and that they had a right to do it?

A. To the best of my recollection that was so.

22 X Q. When you had previously bought and used Rahtjen's compositions, coming from Suter, Hartmann & Company, you did so because these goods of their manufacture were regarded by you and others as valuable, and you did not concern yourself, did you, as to whether they were made according to some patent or not?

A. I did not make any inquiry about it, but the conviction was that we were getting what was represented.

23 X Q. What you were after, however, was the well-known composition sold only by Suter, Hartmann & Company and their agents?

A. Yes, considered the best in the market.

24 X Q. And when M. Holzapfel & Company entered into this competition you supposed, did you not, that they were going to put out, and did put out, substantially the same goods as you had been previously buying?

495 A. I cannot say that, but this I can say: that they represented the goods to be quite as good as Rahtjen's, and considerably cheaper.

Redirect examination by Mr. McMASTER:

Re-D. 25 Q. Who introduced Rahtjen's composition to your attention or to your firm?

A. Mr. Albert Holzapfel.

Re-D. 26 Q. It was through his push or energy, was it not, that you purchased the Rahtjen's composition?

A. That combined with the quality of the composition.

Re-D. 27 Q. As I understand you, at all times that you were purchasing this from Mr. Albert Holzapfel, you understood that it was manufactured in accordance with a patent, although you never took the trouble yourself to examine the formula of the specifications of the patent?

Objected to as irrelevant, incompetent and immaterial.

A. That is so.

Recross-examination by Mr. MERWIN:

Re-X 28 Q. You did not care, when you were buying from Mr. Holzapfel as long as you regarded the article as the best in the market, whether it was made according to a patent or not?

A. There would be some protection in it being a patent. There were many compositions that we used, which after using them once or twice we would not use them again. They were deleterious to the vessel.

Re-X 29 Q. But you would not care if the best article was not made under a patent. You would just as lief have it as if it were made under a patent?

496 A. Not as lief have it; you would not have the same assurance until you had proved it—until the vessel had gone two or three voyages.

Re-X 30 Q. If the article you were using you knew to be the best in the market it would be of no concern to you how it was made if you had already tried it and knew it to be the best in the market.

A. Not if we had proved it to be the best. In answer to that I may say we condemned several compositions simply for the evil effect they had on the iron.

Re-X 31 Q. Your tests, however, had shown that the Rahtjen's composition was the best in the market, as I understand you at the time when you were buying of A. C. Holzapfel?

A. Yes, it was the best that we knew at the time.

Re-X 32 Q. This was when A. C. Holzapfel was agent for Suter, Hartmann & Co.?

A. Yes.

Re-redirect examination by Mr. McMASTER:

Re-re-D. 33 Q. A composition for ships' bottoms made under a patent, and made according to the formula given in the specification of that patent, would have more value as to the uniformity of manufacture, and more of a guarantee that it was made according to that formula, than would an unpatented article, would it not?

Objected to as incompetent, irrelevant and immaterial, because the witness has not been shown to be qualified as an expert to testify to such fact.

A. Yes.

Re-re-D. 34 Q. And it would be so regarded by the shipping trade generally, would it not?

Same objection.

A. Yes.

497 Re-recross-examination by Mr. MERWIN:

Re-re-X Q. 35. If a composition which you had tested and found to be best in the market as you have called the Suter, Hartmann &

Co.'s Rahtjen's composition, were afterwards improved upon by secret process so that it was a better composition, you certainly would not object to it for that reason, would you?

Objected to as incompetent, irrelevant and immaterial.

A. Not if assured that it did not injuriously affect the iron.

Re-cr-X Q. 36. The mere fact that it had been improved upon and the improvement kept secret so long as the results from its use were equal or better would have been no objection, would it?

A. On any patents that we dealt with we had an assurance about its effect on the iron. If a composition was equally good for keeping a vessel clean and not injurious to the iron we should certainly have no objection.

GEORGE NICHOLL.

Sworn to before me, etc.

ALEXANDER RIDGEWAY,
Notary Public.

Adjourned by consent to 2 o'clock p. m., August 11, to the same place.

2 P. M., *August 11th*, 1899.

Met pursuant to adjournment.

Present: Counsel as before.

ALBERT C. A. HOLZAPFEL, a witness called on behalf of the defendant and being duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

498 A. Albert Charles Augustus Holzapfel; 46 years of age; address, 57 Fenchurch street; a director of Holzapfel's Compositions Co., Ltd., the defendant.

2 Q. The business of that company, as I understand it, is the manufacture and sale of compositions for ships' bottoms?

A. Yes, for ships' bottoms and for other purposes also.

3 Q. When did you first engage as employee or otherwise in the business of selling compositions for ships' bottoms?

A. In April, 1874, I was engaged by the firm of Suter, Hartmann & Company, of Liverpool. They were then agents for Rahtjen's composition, in England.

4 Q. Were you at that time a clerk in their office in Liverpool?

A. Yes, I was engaged as a clerk.

5 Q. At that time do you remember under what title the composition or compositions handled by said Suter, Hartmann & Co. were sold?

A. They were advertised as "Rahtjen's patent composition," and also invoiced in the same manner.

6 Q. Do you remember how the goods were marked and put up?

A. The marking of the goods was done in Liverpool under my supervision, because the composition was during that time manufactured at Liverpool; and I think the casks were merely numbered and marked No. I and No. II—these being the only brands of Rahtjen's composition sold at that time. There were probably the

initials, S. H. & Co. on the casks; but I am not quite positive about that. The work was done at the time in temporary premises and in a rather rough-and-ready manner.

7 Q. Did the name "Rahtjen" or "Rahtjen's composition" appear anywhere on the vessels containing the composition which Suter, Hartmann & Co. sold at that time?

Objected to as incompetent, irrelevant and immaterial.

499 A. I do not remember having seen it on any casks that passed through my hands.

8 Q. What was the extent of Suter, Hartmann & Co.'s business when you went with them in 1874, if you know?

Same objection.

A. At that time the business was in its infancy. The firm had their principal office in London, and branches at Liverpool and Glasgow. At Liverpool fairish progress had been made for the short period they had been established. In London they were doing practically nothing. In Glasgow some little progress was being made by Mr. Newman. I think from the lists we were circulating at the time it appeared that about 120 ships in all had been painted in the United Kingdom with Rahtjen's composition.

9 Q. That is, painted with Rahtjen's composition up to about the time that you entered Suter, Hartmann & Co.'s employ.

Same objection.

A. Yes.

10 Q. And in what kind of receptacles was the composition sold by Suter, Hartmann & Co. put up?

Same objection.

A. It was put up in old petroleum or oil barrels, each containing four hundredweights.

11 Q. How long did you remain in the Liverpool office of Suter, Hartmann & Co.?

Same objection.

A. Till the beginning of December of the same year.

12 Q. And then where did you go?

Same objection.

500 A. I was requested to proceed to the firm's London office and assist there.

13 Q. While you were in the employ of Suter, Hartmann & Co. in their London office did you become familiar with the markings on the vessels containing the composition sold by them and the manner of invoicing the same?

Same objection.

A. The vessels or barrels which contained the composition that was sold in London had been actually marked under my own super-

vision in Liverpool in the manner already described. The invoicing was done exactly as it was done in Liverpool.

14 Q. How long did you remain in the London office of Suter, Hartmann & Co.?

Same objection.

A. Just about a month—till January, 1875.

15 Q. Then what did you do?

Same objection.

A. I was requested by the firm to proceed to Bristol and Cardiff with a view of my becoming their agent for the Bristol Channel district.

16 Q. And did you comply with such request?

Same objection.

A. Yes; I at once proceeded as directed, and after corresponding with the firm on the future of Bristol and Cardiff they accepted my recommendation as to my staying in Cardiff for their account.

17 Q. What were your duties as agent in Bristol and Cardiff?

Same objection.

501 A. I made offers to coat the vessels that were coming to Cardiff with Rahtjen's patent composition, and I superintended the application when I succeeded in getting the order. I also corresponded with the firm and its two branch houses at Liverpool and Glasgow about the business.

18 Q. During the time that you were agent for the firm in Bristol and Cardiff how was the composition which you received from Suter, Hartmann & Co. put up and how was it marked?

Same objection.

A. It was marked as it had been marked before at Liverpool, and put up in the same way until Mr. Rahtjen opened a factory himself in Liverpool, when he adopted smaller barrels and of better quality.

19 Q. While you were agent for Suter, Hartmann & Co. at Bristol and Cardiff was any one associated with you in the carrying on of such business?

Same objection.

A. Six months after I came to Cardiff, Mr. John Hartmann, an elder brother of the partners in the firm of Suter, Hartmann & Co., came and joined me, and we then established ourselves as buying agents for Rahtjen's composition under the title of Hartmann & Holzapfel. That was about the 1st of July, 1875.

20 Q. And how long did that arrangement continue?

Same objection.

A. I remained in Cardiff till April, 1876, when the firm of Suter, Hartmann & Co. offered us their agency in Newcastle-on-Tyne and for the Northeast Coast district. I then proceeded to Newcastle for account of Mr. John Hartmann and myself, and opened a branch

office in Newcastle under the style of Hartmann & Co. The
502 partnership was dissolved in July, 1878; and then Mr. John Hartmann retained the Cardiff business, while I retained the Newcastle business.

21 Q. About when did Mr. John Rahtjen open a factory in Liverpool?

Same objection.

A. That would be either at the end of 1875 or 1876.

22 Q. And after that time and during your continuance in business, either at Bristol and Cardiff or at Newcastle-on-Tyne, how was the composition which you received from John Rahtjen or through Suter, Hartmann & Co. put up and marked?

Same objection.

A. After Mr. John Rahtjen started manufacturing there was a third composition called "No. III" manufactured; subsequently to that also a composition called "III A." The No. I was then put up in barrels of two hundredweight, as also the No. II. The No. I was marked on the white head with the words "Priming," with the running number and port mark, and with the initials "S. H. & Co." in black letters. The No. II was marked with white letters on red ground with the Roman II, the initials "S. H. & Co.," the running number and the port mark. No. III A and III were in hundredweight barrels which had black heads, on which was marked in white letters a Roman III or III A; the initials "S. H. & Co.," the port mark, and the running number.

23 Q. And that marking which you have described continued how long, so far as you know?

Same objection.

A. It continued during all the time I was connected with Suter, Hartmann & Co.; that is, till November, 1881; and, so far as I can remember, and so far as came under my notice when I trav-
503 elled about and saw ships in dry dock subsequently, it continued till the spring of 1883.

24 Q. Look at the photograph I now show you, marked "Defendant's Exhibit Photograph of Barrel Heads," and state whether or not that is a correct photograph or representation of the barrel heads, or some of them you have referred to?

Same objection.

A. I identify this as the marking of the barrel heads as they were received from Suter, Hartmann & Co. or from John Rahtjen from the time that Mr. Rahtjen began to manufacture the paint until I severed my connection with the firm.

25 Q. You have stated, I believe, how the composition was invoiced during the time of your connection with Suter, Hartmann & Co. in Liverpool and in London. Please state how the composition was invoiced and billed by Suter, Hartmann & Co. subsequent to that time?

Same objection.

A. While I was in Cardiff, during the first six months they sent the invoices through me to the owners. I therefore saw them before I sent them on, and they invoiced the paint as "Rahtjen's patent composition." Thereafter they invoiced to Hartmann & Holzapfel as "Rahtjen's patent composition," while the firm was established till 1878, and also to Hartmann & Co. in Newcastle till that date. Subsequently they were similarly invoiced to A. C. Holzapfel—that is myself—till my connection with the firm ceased. Sometimes the London firm and its branches also sent me invoices for paint that they had supplied at ports outside my district to my customers, in which cases they invoiced direct. In those instances they invoiced exactly the same as they did to me—that is, "Rahtjen's pat-
504 ent composition"—and I myself invoiced the goods as such to my customers.

26 Q. Look at the papers now shown you, heretofore marked "Defendant's Exhibit Suter, Hartmann & Co.'s Invoices, 1878 and 1879," and state whether or not you can identify those, or any of them, as anything you have seen before.

Same objection.

A. I identify these as some of the original invoices received by me from Suter, Hartmann & Co. for goods which I ordered from them and for which I paid them. I may state that during the time I was agent in Newcastle I ordered about £10,000 worth of Rahtjen's composition from them and paid about that amount to them.

27 Q. Did the words "Rahtjen's patent composition" appear on those invoices?

Same objection.

A. They did.

28 Q. In printing or writing?

Same objection.

A. In writing.

29 Q. Did you ever receive any other communications during the said period from Suter, Hartmann & Co. or John Rahtjen regarding shipments of said composition?

Same objection.

A. I continually received similar invoices from Suter, Hartmann & Co., and also advice notes from John Rahtjen in reference to the composition which I ordered, and, of course, I was in daily correspondence with the firm.

505 30 Q. Look at the papers now shown you, heretofore marked "Defendant's Exhibit Advice Notes of 1878 and 1879 of John Rahtjen," and state if you can identify those as anything you have seen before?

Same objection.

A. I identify these as advice notes received from John Rahtjen,

sent to me by him in respect to composition which I ordered from Suter, Hartmann & Co.

31 Q. Will you read and explain one of the invoices heretofore marked in evidence in order that we may understand intelligently what it means?

Same objection.

A. This invoice, being the first of the three, was dated London, E. C., June 2nd, 1877. It is addressed Messrs. Hartmann & Co., Newcastle—meaning Mr. John Hartmann and myself. It emanates from Suter, Hartmann & Co. Underneath, but erased, in red lines are the words "James Suter & Co.," who were the predecessors of Suter, Hartmann & Co. It further states, "Terms as usual." "Conveyance, London & North Western railway"—which is the company connecting Liverpool with Newcastle. The first following letters are "Rahtjen's patent composition" underlined. Then under that appear the letters "S. H. & Co." (which were the distinguishing marks of the packages) and the numbers 5,889–'90, which are the running numbers. The next to come are the words underlined, "Two casks No. I;" this number I means priming; but it had been called "No. I" when I was at Liverpool; and, although the casks were marked "Priming," it was still invoiced as No. I. The next thing given is the gross weight of the casks, 4 hundredweight 3 quarters and 19 pounds, the tare of 3 quarters 19 pounds, and then the net of 4 hundredweight. The price charged was 88s. per hundredweight. And the figures next following are "£17.12.0." Then follow underneath the numbers "5,891–'8," being the running numbers of
506 8 kegs No. III A, the words 8 kegs No. III A being underlined. The gross weight is given as 9 hundredweight 3 quarters 27 pounds, the tare of 1 hundredweight 3 quarters 37 pounds, the net of 8 hundredweight, at 134s. 6d. per hundredweight, giving the price of £53 16d. Then follows the addition of that sum to the £17 12s. No. I, making a total of £71 8s. Next is deducted my agency commission of 15 per cent., amounting to £10 14s. 2d., and leaving £60 13s. 10d. To that is added two casks, 10s., and eight kegs, 32s., being £2 2s. in all, and giving a total of £62 15s. 10d., the net amount of the invoice.

32 Q. Now, please explain in a general way the meaning of the entries, etc., appearing in "Defendant's Exhibit Advice Notes of 1878 or 1879," or one of them.

Same objection.

A. I will take the first one, dated from Bank Hall lane, 15th July, 1878. It states, "Please to receive weights of four casks and six kegs patent composition sent today to South Shields by London & North Western railway, as ordered, yours respectfully, John Rahtjen." Then are the words "A. C. Holzapfel, Esq., Newcastle." Next follow the distinguishing marks "S. H. & Co." and below that the running numbers of 13,310–13,613. In the middle of the paper are given the running numbers 13,610–'3, four casks with the Roman I. Below that are given the individual weights of the single casks, set against

the respective running number, 2 hundredweight 1 quarter 24 pounds; tare, 1 quarter 24 pounds (which refers to casks 13,610); 2 hundredweight 1 quarter 13 pounds; tare, 1 quarter 13 pounds (which refer to casks 13,611); 2 hundredweight 1 quarter 24 pounds; tare, 1 quarter 24 pounds (which refer to cask 13,612); 2 hundredweight, 1 quarter 20 pounds; tare, 1 quarter 20 pounds (which refer to cask 13,613). Next are given the additions of the gross
507 weights of the casks, being 9 hundredweight 2 quarters 25 pounds; and next the addition of the tare, being 1 hundredweight 2 quarters 25 pounds, leaving the net weight 8 hundredweight. Below that follow the numbers, "13,614–'9. Six kegs No. III." Then are given the following running numbers: 13,614; gross weight, 1 hundredweight 0 quarters 27 pounds; tare, 27 pounds; 13,615; gross weight, 1 hundredweight 1 quarter 1 pound; tare, 1 quarter 1 pound; 16,616; gross weight, 1 hundredweight 1 quarter 1 pound; tare, 1 quarter 1 pound; 13,617; gross weight, 1 hundredweight 1 quarter; tare, 1 quarter; 13,618; gross weight, 1 hundredweight 1 quarter; tare, 1 quarter; 13,619; gross weight, 1 hundredweight 1 quarter; tare, 1 quarter. Then are given the additions of gross weights, being 7 hundredweight 2 quarters 2 pounds, and of the tares 1 hundredweight 2 quarters 2 pounds, leaving 6 hundredweight. Below that is an entry of the page in which the advice note was entered in my stock book, and that is in the handwriting of one of the clerks then in my employ.

33 Q. Please compare "Defendant's Exhibit Advice Notes of 1878 and 1879 of Rahtjen" with "Defendant's Exhibit Suter, Hartmann & Co.'s Invoices of 1877, 1878 and 1879," and state whether they have any reference to the latter.

Same objection.

A. The first advice note from Rahtjen, dated July 15th, 1878, refers to the same parcel which was invoiced to me by Suter, Hartmann & Co. under date of July 16, 1878, being the second paper of Exhibit Suter, Hartmann & Co.'s Invoices. The other two advice notes have no reference to the invoices exhibit, but to other invoices which have been destroyed; only specimens of each document being kept by me.

34 Q. During all the period that you were in the employ of Suter, Hartmann & Co., either in London, Bristol and Cardiff, or
508 Newcastle-on-Tyne, what was the meaning of the words "Rahtjen's patent composition," and how were they understood by the trade?

Same objection.

A. While I was in their employ and while I was their agent it was always commonly understood among the employees, agents and principals of the firm that there was a patent, according to which the composition was manufactured, and which had been filed by Mr. Rahtjen for his protection before the firm of Suter, Hartmann & Co. commenced manufacturing Rahtjen's composition in England.

35 Q. And how was it represented by Suter, Hartmann & Co., or by their agents, to the public?

Same objection.

A. It was sold and invoiced invariably as "Rahtjen's patent composition."

36 Q. During the time that you were connected in business with Suter, Hartmann & Co., either as employee or agent, did you ever see any casks or receptacles containing the composition sold by them marked in any different way or with any different description from what you have already stated in your testimony?

Same objection.

A. I did not, except in regard to one parcel, which was forwarded by Mr. John Rahtjen to Liverpool, and was transshipped there abroad, the markings of which I do not remember, but which I do remember were different from those in use by Suter, Hartmann & Co. at that time. That was in 1874.

37 Q. How large was that shipment?

Same objection.

509 A. That consisted either of 30 or 40 barrels, which were addressed to the Austrian Lloyd at Trieste, and were transshipped under my personal supervision in bond.

38 Q. Was anything ever altered or added to the inscription on barrels which you received from Suter, Hartmann & Co. during the whole period of your connection with them?

Same objection.

A. Nothing was ever done to alter the marks on the barrels or to a ld anything to them.

39 Q. What was done with the barrels when either a sale was made or contract entered into for painting a vessel?

Same objection.

A. When the composition was sold it was delivered to the customer, or to the vessel as might be directed, in the original barrels and with the original marks. When it was supplied by contract the barrels were sent down to the dry dock, and there opened, and the composition was taken out, and applied to the ships, and the empty barrels returned together with any rests that might remain over.

40 Q. I understand from your testimony that your agency for Suter, Hartmann & Co. continued down till November, 1881?

Same objection.

A. Yes.

40*a* Q. Did you after that date continue in the business of selling or manufacturing Rahtjen's composition, or so-called Rahtjen's composition?

Same objection.

A. No. I had no interest in any composition business from
510 that time until 1887. I had a ship-owning business at the time, to which I entirely devoted myself. In the spring of 1887, I, however, joined my brothers in London, taking charge of their London office as manager.

41 Q. What was the title of the business carried on by your brothers at that time?

Same objection.

A. At Newcastle it was M. Holzapfel & Co. At London, Glasgow and Liverpool it was Holzapfel & Co. At Cardiff it was Holzapfel, Petrie & Co. The difference in the names was due to the fact of there being different partners in the different firms.

42 Q. How long did you remain in charge of the London office of said firm of Holzapfel & Co.?

Same objection.

A. I have been in charge of the London office ever since to this day. In 1890, when the business was formed into a joint-stock company, I became a director of it, and continue so to this date.

43 Q. When you entered the employ of your brother's firm were they manufacturing and selling any composition under the name of "Rahtjen's composition" or "Rahtjen's patent composition" or some term of which the word "Rahtjen" formed part?

Same objection.

A. I remember well their commencing to manufacture Rahtjen's composition in 1883; and when I rejoined them in 1887 I also found that the trade in that composition had steadily increased, as well as the trade in all their other products.

44 Q. State whether or not there was, or has ever been, any secrecy or concealment on the part of the Holzapfel firm in respect to the manufacture and sale by them of Rahtjen's composition?

Same objection.

511 A. Rahtjen's composition of Holzapfel's manufacture, was advertised with their name in all the most important shipping papers in England, and also abroad. It was sold publicly, without secrecy, and the shipping public and other buyers were well aware that there was absolutely no connection between the two firms. There was nothing surreptitious in any way in the handling of the goods by the Holzapfel firm, and in their sale, and the frequent advertisements were witness of the open manner in which the article was put before the public.

45 Q. Do you know whether or not Suter, Hartmann & Co. knew of the manufacture and sale by the Holzapfel firm, of a composition for ships' bottoms under the title of "Rahtjen's composition" or "Rahtjen's patent composition" or some title of which the word "Rahtjen" formed a part?

Same objection.

A. They could not know anything better than that fact, as it was daily before their eyes, not only in their advertisements, but also in actual competition between the two firms.

46 Q. How was it after the firm of Suter, Hartmann became incorporated under the title of The Suter, Hartmann & Rahtjen's Company?

Same objection.

A. There was no difference from before. We continued to supply Rahtjen's composition as before, and they carried on their business just as previously. The new company had exactly the same means of knowing. I must state, that about that time we secured the whole of the supplies of the Austrian marine for Rahtjen's composition which had previously been supplied by Suter, Hartmann & Co. They could not help being painfully cognizant of the fact of the loss of that business.

512 47 Q. When you entered the employ of the Holzapfel firm in charge of their London office in 1887 do you remember whether or not they advertised their Rahtjen composition by means of any circulars or by advertisements in newspapers?

Same objection.

A. They were the same standing advertisements and circulars which had already existed before, and which I had been shown while my brother lived with me at Newcastle, and when any special or any important new customer was acquired the fact was immediately made public in some way or other; for instance, when we secured the business of the Austrian marine we published a lithographic copy of their letter to us stating that after trial of our Rahtjen composition they had decided to give us the orders for all their future supplies provided we would open a depot at Trieste.

48 Q. Look at the papers now shown you heretofore produced in evidence as "Defendant's Exhibit Holzapfel & Co. Circulars, Advertisements, Letter-heads, etc.," and state whether you had ever seen any of them before.

Same objection.

A. I am quite familiar with all the documents forming part of this exhibit. The first was drawn out in my own house when I was not a partner in the business, and it was circulated among all the ship-owners in the United Kingdom and elsewhere, by mailing a copy of them. The next two were used in the ordinary course of business by us. The advertisements speak for themselves, as also the letter-heads. The circular dated 28th January, 1890, refers to the formation of the business into a limited company. The advertisement in the "Light-house," dated February 1st, 1890, contains not only our advertisement, but also that of Suter, Hartmann & Rahtjen Composition Company, and it publishes a letter from Mr. John Rahtjen stating that the only composition with which he has any connection is Hartmann's Rahtjen, with an open hand in
513 red as a trade-mark. It also contains a request by Suter, Hartmann & Rahtjen's Composition Company asking ship-

owners to specify Hartmann's Rahtjen when not ordering direct from them. Under date January 9th, 1892, there is a list showing the monthly tonnages and monthly number of ships supplied with Holzapfel's compositions. The last document is an advertisement dating from about 1895, and used by our former agents at Genoa, G. B. Gastaldi & Co.

49 Q. Can you produce any papers showing the manner in which Suter, Hartmann & Co., or their branch houses or agents, described the composition sold by them to the trade during the time of your connection with Suter, Hartmann & Co.? I mean papers other than the invoices and notes of advice.

Same objection.

A. I produce a personal letter from Mr. William Hartmann, senior partner of Suter, Hartmann & Co., dated 28th August, 1878, having in the left-hand corner a picture of the "Great Eastern," and over the top the words "Rahtjen's patent composition for ships' bottoms;" underneath, "Suter, Hartmann & Co., London, Liverpool & Glasgow." It was the ordinary letter-heading of the firm on which the correspondence addressed to me was written at that time. I produce, moreover, a letter signed "R. Le Doux," the managing partner of the Liverpool branch house, dated the 25th of March, 1881, having a similar design of the "Great Eastern" in the left-hand corner; underneath, the words "Hartmann, Le Doux & Co.," and over the top of the design the words "Rahtjen's patent composition for ships' bottoms." This was the regular office heading of the firm on which correspondence addressed to me was written.

Defendant's counsel introduced in evidence the two letter-
514 heads on the letters produced by the witness, and the same are now marked "Defendant's Exhibit Letter-heads Suter, Hartmann & Co. of 1878," and "Defendant's Exhibit Letter-head Hartmann, Le Doux & Co. of 1881," respectively.

Same objection.

Adjourned by consent to 11 a. m., August 14th, to the same place.

AUGUST 14TH, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

Examination of Mr. A. C. HOLZAPFEL resumed:

50 Q. I understand from your preceding testimony that at some period in the past, you or your firm purchased composition for ships' bottoms from the firm of Suter, Hartmann & Company. Am I correct in this understanding?

Objected to as incompetent, irrelevant and immaterial.

A. I purchased composition from Suter, Hartmann & Company while I was at Newcastle, between May, 1876, and up to October or November ,1881.

51 Q. And as what did you purchase it?

Same objection.

A. I purchased that composition as "Rahtjen's patent composition," the understanding being that it was made according to Heinrich Rahtjen's patent of 1873.

515 52 Q. How did you come to go out of the business of selling so-called "Rahtjen's composition for ships' bottoms"?

Same objection.

A. I had reason to believe in the latter part of 1881 that the composition supplied to me by Suter, Hartmann & Company was not of the quality as understood between them and myself, and not entirely in accordance with the Heinrich Rahtjen patent. When I had accumulated sufficient proof of this circumstance I sent them notice that I refused to represent them any longer, and that I placed the composition which I still had in stock at their disposal in a public warehouse in Newcastle.

53 Q. How was the fact, or what you believed to be the fact, that the composition they then furnished you was not made entirely in accordance with the Heinrich Rahtjen patent of 1873 brought to your attention or notice?

Same objection.

A. It had been repeatedly suggested to me in 1881 that the results of ships coated with Rahtjen's patent composition at Newcastle were not as good as they had been previously. I, therefore, had the Rahtjen's patent composition which I had in stock analyzed for mercury, which was the essential anti-fouling ingredient contained in it. There were at that time two or three compositions which I particularly bought from Suter, Hartmann & Company—III A, supposed to contain 8 per cent. of mercury, and No. III, supposed to contain 10 per cent. of mercury; and the analyses showed that both these numbers contained only about half the percentage of mercury which was understood to be contained in them; and, having ascertained that fact, I wrote, or my solicitors wrote—I am not sure which it was—to Messrs. Suter, Hartmann & Company, as indicated and terminated my connection with them.

516 54 Q. You say, as I understand, that you placed the composition which you had in stock at that time in warehouse or in bond subject to their order?

Same objection.

A. Yes.

55 Q. Did they accept such stock?

Same objection.

A. They did not. They declined to take the composition back and insisted on my paying the drafts which I had accepted in respect to it, and as a matter of fact I did pay these drafts on maturity; and the composition thus became my property. Immediately after my giving up the agency, Messrs. Suter, Hartmann & Company commenced an action against me for breach of contract, claiming £1,000

damages in accordance with an agreement which existed between them and myself at that time, and which dated from 1879. I commenced a counter-action for repayment of the cost to me of the composition, and I therefore left the composition in warehouse till the action was decided. The result of the trial was that it was referred to arbitration, and the arbitrator awarded £400 damages to Messrs. Suter, Hartmann & Company, which I paid. The composition left in the warehouse, I then sold to my brothers in about June, 1883, and it is some of these casks which I identify as having been photographed.

56 Q. The photograph shown you, you identify as a photograph of some of these casks?

Same objection.

A. Exactly.

57 Q. Did you ever have any other trouble with Suter, Hart-
517 mann & Company, or any of them, during the time that you were connected with them in business?

Same objection.

A. Yes. When I dissolved partnership in 1878 with Mr. John Hartmann, who was the brother of the three principal partners in Suter, Hartmann & Company, and when I then retained the agency for Newcastle, I asked Messrs. Suter, Hartmann & Company to enter into an agreement with me appointing me their agent for a certain number of years. This they refused to do at the time; and as there was absolutely no agreement between us except the established custom as to my working the agency, and which they would have been at liberty to terminate at any time, I tried, in conjunction with another firm of Edwards & Sons, in South Shields, experiments with another composition with a view of giving up the agency for Suter, Hartmann & Company, and running such rival composition if it proved to be of a salable quality. The fact of my doing so became known to the firm in London in the spring of 1879, and Mr. William Hartmann came to Newcastle to see me. When he first met me he handed me a paper from the high court of justice, purporting to be an injunction restraining me from making any composition in imitation of their patent. Mr. Hartmann reproached me at the time for having contemplated to enter into opposition against him, and asked my reason for so doing. I told him that this was due to his refusal to give me an agreement; that I was a married man and had to take care to consolidate my position and not to be entirely dependent on the good will of anybody. He then said that he was willing to give me an agreement for ten years if I desisted from continuing to make the composition. I agreed to do this, and we therefore entered into an agreement that I should represent them in

Newcastle and northeast coast district for ten years, and it is
518 in respect to this agreement that the £400 damages were awarded to them by arbitration in 1883.

58 Q. And what became of the suit or the proceedings in court

which had been instituted, as I understand, by Mr. Hartmann or his firm in 1879?

Same objection.

A. He took the injunction back and said the suit would be abandoned.

59 Q. Do you know of any parties other than the complainant company or their predecessors in business using or employing any name to describe the composition for ships' bottoms made and sold by such other parties under the name of "Rahtjen composition," or under a title of which the name "Rahtjen" formed a part?

Same objection.

A. I know of the following who did so—that is, William Wright, of Antwerp, who has since died; Dr. Pflug, of Kiel, Germany, who does not continue to do so now, but sells composition under his own name, and Turner, Morrison & Company, of Calcutta, who continue to do so to the present date.

60 Q. Do you know of any company called the London Oil and Colour Company?

Same objection.

A. Yes. That was the name of William Wright's business in Antwerp, and, I believe, it is now defunct, since his death. I produce one of the circulars of the London Oil and Colour Company of which my company obtained possession.

Defendant's counsel offer in evidence a circular last produced by the witness, and the same is marked "Defendant's Exhibit Circular of London Oil & Colour Company of 1886."

519 61 Q. Now, coming down to your connection with the present defendant company, can you tell me whether such company has expended any amount of money in advertising and offering for sale of the Rahtjen composition manufactured by them, and, if so, about how much a year?

Same objection.

A. Ever since my connection with the defendant company we have advertised all our goods, and amongst them, prominently, Rahtjen's composition, which has occupied about one-fifth or one-sixth of the space taken up by our advertisements. The total sum spent on advertisements is between £1,500 and £1,800 a year, and has been so since 1887.

62 Q. Now, prior to the formation of the present company do you know whether their predecessors, Holzapfel & Company, advertised the said composition as made and sold by them, and, if so, how much they expended in advertisements?

Same objection.

A. Rahtjen's and the International compositions were both advertised from 1883 onwards, each occupying about half the space of the advertisement until further compositions were added to those manu-

factured by us in 1887. Therefore, Rahtjen's compositions from 1883 to 1887 occupied about half of our advertisements, and the sums spent during those years are from £1,000, progressing upwards to £1,500, as time advanced.

63 Q. Please state in a general way whether the volume of business of the defendant company and of their predecessors in business, has or has not increased. I specially refer, of course, to the Rahtjen composition made and sold by it or them.

Same objection.

520 A. The business in the Rahtjen composition, as also in the other products of our firm and afterwards of our company, has steadily increased and is now the largest business of its sort in the world.

64 Q. How has the defendant company or their predecessors in business, Holzapfel & Company, marked the said composition in the past and at present so far as your knowledge extends; that is, have they or not always marked it with the name of which the word "Rahtjen" formed a part?

Same objection.

A. The name Rahtjen was invariably marked on the vessels containing such composition.

65 Q. And as manufactured by whom?

Same objection.

A. Our name as manufacturers was always identified with the goods.

66 Q. Was there any concealment of the fact that they were manufactured by Holzapfel & Company or by the defendant company, or any suggestion that they were the goods manufactured by Suter, Hartmann & Company or their successors in business?

Same objection.

A. It was never suggested or attempted to be suggested that the Rahtjen composition sold by us was manufactured by Suter, Hartmann & Company. Since 1887 or 1888 our trade-mark of a propeller was also added as a further distinguishing mark to these goods. Before that they were marked with one or other of the registered trade-marks of Holzapfel & Company which are in evidence in this suit.

67 Q. Have you any knowledge that the complainants or their predecessors in business, Suter, Hartmann & Company, use or have used any other mark to distinguish the goods of their manu-
521 facture other than the words "Rahtjen" or "Rahtjen's composition," or words substantially to that effect?

Same objection.

A. Since 1883, when the firm of Suter, Hartmann & Company and their successors first began to mark their goods with the words "Rahtjen's composition," they have also added a red hand as a dis-

tinguishing mark of their manufacture and have advertised the fact in the papers.

Cross-examination by Mr. MERWIN:

68 X Q. How do you know that the business of the defendant company is larger than any other in the world of like character?

A. I obtained the number of ships coated by the various firms in the principal ports of the world. I know the various firms who manufacture composition and whom they supply, and I have a means thereby of satisfying myself that our trade is the largest. But I will give you figures which your clients cannot beat, if you wish it, and that is we are turning out this year at the rate of 2,500 tons of composition, and if they can swear to more I will bow my head.

69 X Q. What is the total tonnage of vessels coated with the defendant's composition?

A. During the present year we are working at the ratio of close on seven million tons, but that does not include the tonnage of many ships which are painted with composition ordered from us by dry-dock companies abroad, and paid for against documents in London, and from whom we receive no list of vessels coated.

70 X Q. In the tonnage which you claim for the defendant company, do you include the total tonnage of vessels only partly coated with your composition?

A. I think that they are included in that way, but that would not affect the result to the extent of more than one per cent.

522 71 X Q. What was the tonnage of vessels coated by the defendant's composition in the year 1897?

A. I have not the figures here now, but it would be between four and five million tons.

72 X Q. During your agency for Suter, Hartmann & Company how many kinds or varieties of Rahtjen's composition did you purchase from them?

A. No. I, No. II, No. IIIA and No. III.

73 X Q. Which of these was manufactured, as you understood, under the formula of the patent of Heinrich Rahtjen of November, 1873?

A. No. II, No. IIIA and No. III were all manufactured essentially according to the patent. All the ingredients contained in No. I were also mentioned in Heinrich Rahtjen's specification, but it lacked the essential factor of mercury, which was the anti-fouling material in the patent, and gave it its success. No. I was only the usual priming, as applied by all other composition manufacturers, but differing somewhat in manufacture from that of many others.

74 X Q. Please give the formula at present used by the defendant company for its Rahtjen's composition No. I.

Objected to as immaterial and irrelevant.

A. It contains the ingredients mentioned in Heinrich Rahtjen's specification except oxide of mercury and the arsenic.

75 X Q. Do you mean that the formula, with these exceptions, is identical with the formula of that patent?

Same objection.

A. The proportions are different, because the arsenic and mercury affect the consistency of the paint, and in substitution of them the coloring matter or Venetian red is increased.

76 X Q. What is the formula of Rahtjen's composition No. III as now manufactured by the defendant?

Same objection.

523 A. Our Rahtjen No. III has been improved two or three years ago, and the improvement is a trade secret of our own which I cannot divulge, but it is still manufactured, in my opinion, within the radius or on the main principles of Heinrich Rahtjen's patent of 1873.

77 X Q. The formula of that patent is clear and specific. Is the formula now employed by the defendant company in the manufacture of Rahtjen's composition No. III within the terms of that patent?

Same objection.

A. Some of the No. III which we manufacture is still in exact accordance with the patent, except that the percentage of mercury is larger than John Rahtjen prescribes. Other qualities which we sell are made according to the improved system which, as stated, is still within the radius of the patent, but about which I decline to give details, as its manufacture is a trade secret of our firm.

78 X Q. Is your so-called improved Rahtjen composition No. III made in strict accordance with the Rahtjen's patent referred to?

Same objection.

A. I have already refused to give further details in regard to that matter.

79 X Q. Is the Rahtjen composition No. III manufactured and sold by the defendants in the United States made in strict accordance with the formula of the patent above referred to?

Same objection.

A. I have not looked up the instructions and I am not aware at this moment whether the one schedule applies which is in accordance with the old patent or whether the new or improved schedule applies. In the latter case I can only repeat what I stated before.

524 80 X Q. When did John Rahtjen begin manufacturing Rahtjen's compositions in Liverpool?

A. I cannot fix the date exactly, although I visited him in Liverpool, but I think the new factory was ready at the end of 1875 or the beginning of 1876. He may have manufactured the composition in the old premises in the early part of 1875, but I cannot tell this for certain.

81 X Q. Where were the Rahtjen's compositions manufactured

when you were first connected with the business of Suter, Hartmann & Company?

A. Those used in England were manufactured at Liverpool by Suter, Hartmann & Company, from the time I arrived till I left Liverpool—from the 12th April, 1874, until the early part of December in the same year.

82 X Q. Do you know how long before April, 1874, when you first became connected with Suter, Hartmann & Company, they had been selling Rahtjen's compositions?

A. I only know by hearsay, and I believe it was a little over two years since they started selling it in England.

83 X Q. When was the International brand of composition first manufactured, if you know?

Objected to as immaterial and irrelevant and as inquiring into a composition not the subject of this litigation.

A. In November, 1881.

84 X Q. That was first manufactured then by M. Holzapfel & Company?

Same objection.

A. Yes.

85 X Q. If you know, state when was that firm organized.

A. About that time.

86 X Q. Do you know the exact date?

525 A. I do not. I have not prepared myself by looking it up.

87 X Q. It succeeded to your business or trade, did it not?

A. Shortly after its formation the partners agreed to buy the good will of my business from me and I undertook to transfer the good will to them to the best of my ability.

88 X Q. When was that transfer made?

A. That date I cannot recall either.

89 X Q. Was it in November, 1881?

A. It would probably be in November or December of that year, or perhaps even in January of the following year.

90 X Q. Do you know when the firm of M. Holzapfel & Company first announced to the public their succession to your business?

A. I suppose it would be contemporaneously with the conclusion of that agreement.

91 X Q. Do you know the date?

A. I do not remember the date. It was in one of the three months mentioned by me.

92 X Q. Did you know of the trade-mark or the trade name "Rahtjen's composition" before April, 1874, when you were first connected with Suter, Hartmann & Company?

A. I never heard the name of "Rahtjen" until I arrived at Liverpool.

93 X Q. When was that?

A. That was in April, 1874.

94 X Q. How did Suter, Hartmann & Company first learn that

while you were their agent you were engaged in making or selling some other composition for a like purpose as Rahtjen's composition?

A. I communicated the circumstance to a clerk of mine who managed my Sunderland office, and he informed Mr. Hartmann of it.

95 X Q. What did you call the paint that you were thus making or selling on your own account?

A. That was called the German composition.

526 96 X Q. Did you not, as a matter of fact, yourself first communicate to Suter, Hartmann & Company or some member of the firm that there was a German paint or composition being used and ask them about it, and say that you would yourself try to get a sample of it for them?

A. I cannot recall such a fact to my mind.

97 X Q. Was it not the fact that you first represented to them that some one else was interfering with your business by selling a German paint or composition and complained to them of the fact and asked them to find out who was doing it, or say that you would endeavor to get a sample and send to them for their composition?

A. I have already stated that I cannot recall that circumstance to mind if it ever took place.

98 X Q. Did not Suter, Hartmann & Co. first learn of your connection with the manufacture or sale of the so-called German paint or composition after you had made some such report to them by inquiring of some employee of yours, who disclosed the fact to them?

A. I cannot tell how they found it out, but I know that Mr. Klee, a clerk of mine, traveled to London in connection with this matter, and that immediately afterwards Mr. William Hartmann came to Newcastle to see me.

99 X Q. Cannot you recall the facts of that somewhat important incident, at least, to determine whether you represented to them that some third party, a competitor of yours, was selling this, thereby advising them, in effect, that you were not doing it?

A. As already stated, I cannot recall such circumstance.

100 X Q. Your testimony, indirect, was to the effect, I believe, that in 1879 you contemplated terminating your agency for Suter, Hartmann & Co., but that at their solicitation, or that of some member of their firm, you consented to continue to act as their agent upon certain conditions; was that true?

527 A. I do not say at their solicitation. I said that Mr. William Hartmann said that he was prepared to give me a ten years' agreement, if I abandoned the manufacture of the German composition.

101 X Q. Was it not the fact that, when Suter, Hartmann & Co. discovered or learned that you were engaged in the manufacture of another composition in competition with theirs, that they threatened to deprive you of the agency, but that, at your solicitation, they consented to your continuing as their agent on certain conditions?

A. No; there was no solicitation on my part. It was a thing arrived at by mutual agreement. They were as ready to give it to

me as I was to accept it, after the personal element of the relations between Mr. William Hartmann and myself had been brought into play.

102 X Q. Is it not the fact that the agreement by which you continued from March, 1879, to act as their agent was brought about by your solicitation or request and coupled with the promise that you would not manufacture or sell a competing composition, rather than at the solicitation or request of Suter, Hartmann & Co. that you should continue as their agent?

A. In reducing the understanding to writing a day or two later Mr. William Hartmann gave his letter such a turn, but in doing so he was not consistent with fact. I, for my part, did not take notice of trifling matters at that time, being somewhat young and inexperienced, and therefore I did not ask him to alter the wording of that letter.

103 X Q. Have you that letter now?

A. I have seen it not long ago in my house, I think, but whether I still have it I do not know.

Counsel for complainant hereby makes demand upon counsel for the defendant to produce the letter referred to before closing his case.

528 104 X Q. Was not that agency contract or agreement of March, 1879, made up of a proposition in writing by you, accepted or closed in some manner by a letter from Suter, Hartmann & Co. or some member of that firm?

A. So far as my memory carries me, the first letter I received regarding that subject emanated from Suter, Hartmann & Co., and was written by Mr. William Hartmann, and in it he announced to me that he had just returned to London and then proceeded to refer to the arrangement as made between us. I do not think, I am almost positive, that no written request of mine ever existed in connection with that matter.

105 X Q. What was the date of the letter from Mr. William Hartmann to you to which you have referred?

A. That I could not give you, not having it before me. It is some years since I read it.

106 X Q. You spoke in your direct testimony of a penalty provision in the agreement of 1879; for what acts of yours was that penalty chargeable?

A. It was as liquidated damages for breach of an agreement.

107 X Q. For breach of what particular things?

A. Of the agreement generally; not of any specific condition; of every or any condition in the agreement.

108 X Q. Did you not offer, in a written proposition to Mr. Hartmann, or to Suter, Hartmann & Co., to act as their agent, and bind to yourself by a penalty of £1,000, not to manufacture or to sell or be interested in the manufacture or sale of other compositions than Rahtjen's composition?

A. Now that you mention the thing, I think a letter to that effect

did emanate from me, but I believe that letter was written subsequent to the firm's letter to me to which I alluded before.

109 X Q. Did you not in a letter dated February 27th, 1879, addressed to Mr. Hartmann or to Suter, Hartmann & Company, write as follows: "The 'Lord Esslington,' which had on our composition last time and turned out very bad after one voyage, is getting
529 a new paint called 'the German patent paint.' Mr. Simey of Sunderland is agent in this district. Do you know anything about this? I will try to get hold of a sample"?

A. It may have been written by one of my clerks without my knowledge. I do not remember the letter myself. My clerks would not be aware of my connection with this new paint, which was carried on actually by Messrs. Edwards of South Shields, and on their premises, and all goods were also bought in their name.

110 X Q. Do you state that you did not yourself make such a representation or statement to Suter, Hartmann & Co., or any member of that firm?

A. I do not recollect having done so, nor of being cognizant of the letter which you have read to me.

111 X Q. Did you not in a letter dated March 20th, 1879, addressed to Suter, Hartmann & Co., or some member of that firm, state as follows: "In consideration of your entrusting me further with your agency for Rahtjen's patent composition, which you were about to withdraw from me, I herewith bind myself, my heirs, executors or administrators, under a penalty of £1,000, not to sell, manufacture or cause to be sold or manufactured, or to take any interest whatsoever in any other composition, whether for the inside or outside coatings of steamers, than Rahtjen's and I further bind myself to push the business to the best of my ability as heretofore."

A. Yes, that letter was drafted by William Hartmann, and I signed it, although, as I have stated, it did not exactly represent the nature of the agreement between us.

112 X Q. Was not the letter in question written by you?

A. It was written by me, but after Mr. William Hartmann had written it out for me at the Station hotel at Newcastle, I think.

113 X Q. Is the provision which I have just read for a penalty of £1,000 the penalty of the contract to which you have heretofore referred?

530 A. Yes. I do not remember whether a formal contract was drawn up, or whether the agreement made between Mr. Hartmann and myself consisted only of an exchange of correspondence, but the penalty of £1,000 was understood to be for breach of contract generally, and, as a matter of fact, they claimed it and did obtain £400 for the reason that I refused longer to sell their composition, for I had not broken the clause in the contract in regard to being interested in any other paint in so far as it is already upon the record that after resigning in 1881 and till 1887 I had no interest whatever in compositions.

114 X Q. When did you resign your agency under the agreement in 1879?

A. Auguste Hartmann called in Newcastle and ascertained then

that I was about to resign. At that time I either wrote by letter or instructed my solicitor to write refusing to sell the composition any further and placing at Messrs. Suter, Hartmann & Co.'s disposal what I still had in stock. I do not know whether this letter was the first intimation they had or whether some conversation took place before leading up to it. I did not say that I resigned it, but merely that I refused to continue it.

115 X Q. When was it that you or your solicitor thus wrote to Suter, Hartmann & Co.?

A. I do not remember the date, not having the books any more.

116 X Q. Was it before or after the organization of the firm of M. Holzapfel & Co.?

A. It would be probably a few days subsequent to it.

117 X Q. Was it before or after your deal or understanding with that firm for a transfer of the business to them?

A. It would certainly be before that.

118 X Q. Are you certain on that point?

A. I should think so.

119 X Q. Was there any written agreement between you and that firm for such transfer?

A. Yes. There was a written agreement drawn up.

531 120 X Q. Will you produce the same?

A. I have not got it.

121 X Q. Where is it?

A. I do not know. My brother may have it for all I know. If he has, there will be no objection to its production.

Counsel for complainant requests counsel for defendant to produce the same in evidence before closing his case.

122 X Q. Did you not write to Suter, Hartmann & Company yourself a letter dated November 25th, 1881, as follows: "Your letter of yesterday is to hand, but I must decline to pay you anything to cancel the contract you refer to. I understood from Mr. Auguste Hartmann, who called upon me today, that you were about to appoint another agent here. I also notice that he is about renting an office here."

A. Very probably that would be a letter from me, but I do not remember it.

123 X Q. In the suit to which you have referred, in 1883, by the firm of Suter, Hartmann & Company against you, you made a counter-claim against them, did you not?

A. I did, for the value of the composition which I had retained and paid for by bills.

124 X Q. The suit was for breach of your contract, was it?

A. That is, to the best of my recollection, for breach of contract.

125 X Q. Was your counter-claim allowed?

A. It was not allowed.

126 X Q. Did the court find that Suter, Hartmann & Co. had been guilty of any failure to live up to the contract on their part?

A. The award merely stated that the arbitrator awarded £400

damages to Suter, Hartmann & Co., I believe, for breach of agreement, but it did not deal with any other issues in the action.

532 127 X Q. Did the award of the arbitrator, as you call him, deal with these questions?

A. It did not deal with that question at all. It never referred to it.

128 X Q. Did not the award of the arbitrator, as you term him, cover the following points: "(1) Did the defendant, in fact, commit any, and, if so, what, breaches of the agreement? If he did, had the plaintiffs previously committed any breach, such as to relieve the defendant from further performance of the contract on his part? (2) Did the plaintiffs, in fact, commit any, and, if so, what, breaches of the agreement? If they did, had the defendant previously committed any breach, such as to relieve the plaintiffs from the further performance of the contract on their part? (3) If any breach was committed by either party which was not excused by the conduct of the other party, then what damages were occasioned by such breach? and that, except on the three points above submitted," he was to "find generally for the plaintiffs or for the defendants on the claim or counter-claim."

Objected to as incompetent and as calling for secondary evidence, the award of the so-called arbitrator being the best evidence of what it contained.

A. Those issues were no doubt put before the arbitrator; but, so far as I recollect, the award said nothing in reference to my counter-claim.

129 X Q. Did the arbitrator, in pursuance of the order of court submitting the matter to him, make an award as follows: "(1) The defendant committed a breach of the agreement sued on by not pushing the sale of Rahtjen's composition referred to in the pleadings in the action to the best of his ability. The plaintiffs did not previously commit any breach such as to relieve the defendant from further performance of the contract on his part. (2) The

533 plaintiffs did not commit any breach of the agreement. (3) I assess the damages occasioned by the breach committed by the defendant at the sum of £400. Generally, I find for the plaintiffs on both claim and counter-claim."

Objected to as incompetent and as calling for secondary evidence, the award of the so-called arbitrator being the best evidence of what it contained.

A. I have not seen the award since it was issued and served upon me. I only speak to the best of my recollection.

Redirect examination by Mr. McMaster:

130 Re-D. Q. How long is it since you have consulted the award of the arbitrator, or the letters between Suter, Hartmann & Company, or William Hartmann and yourself, about which you have been cross-examined?

A. The award I only saw once in my life more than sixteen years

ago. The letters from Suter, Hartmann & Co., to which counsel referred, I do not think I have seen since they were written, unless they were produced at the hearing of the case in 1883, which fact I do not remember; only one thing, a letter about which I was examined, and which was sent to me by Mr. William Hartmann in 1879, do I remember having seen since, and this I came across accidentally in my house two or three years ago. I had not seen it between the time it was written and that date.

131 Re-D. Q. And that was which letter?

A. That was the letter in which he confirmed from London the arrangement about my continuing the agency for the Tyne district.

132 Re-D. Q. Prior to entering Suter, Hartmann & Company's employ in April, 1874, had you any connection as employee or otherwise, or were you in any way engaged in the business of making or selling any composition for ships' bottoms?

534 A. No; that branch of the business was then entirely new to me.

133 Re-D. Q. About how long prior to entering the employ of Suter, Hartmann & Company had they been making or selling Rahtjen's composition, as you understood?

A. I think it had been manufactured in Liverpool only for a few months. Before that I understood it was imported from Germany, but the importation could not be continued on account of the composition containing spirits of wine, which made it liable to a heavy import duty. There were, consequently, premises taken at Liverpool, at which the paint was made in a very rough-and-ready manner.

134 Re-D. Q. And Suter, Hartmann & Company had been engaged in this, the sale of the composition, for about how long?

A. A little over two years, I believe. I cannot give the exact date. I can only form conclusions from the circulars which passed through my hands. Two or three years would be the time.

135 Re-D. Q. How did you come to enter Suter, Hartmann & Company's employ?

Objected to as incompetent, irrelevant and immaterial.

A. I was in Germany on a visit with my parents, and Mr. Schmitger, who is here present, wrote me that he had been offered a position by Messrs. Suter, Hartmann & Company, which he had to decline, and that if I liked to take it I could address the firm in Liverpool, which I did, with the result that I was engaged.

136 Re-D. Q. What was Suter, Hartmann & Company's claim when they learned that you were manufacturing another composition for ships' bottoms in 1879?

Same objection.

535 A. I understood they claimed to have a patent, and that the manufacture, as carried on by me, was an infringement of same.

137 Re-D. Q. I do not remember whether you have stated the

amount of the award by the arbitrators in 1883. Please state what that amount was.

Same objection.

A. The amount was £400, being £600 less than the sum claimed or mentioned in the agreement as being due in case of breach as liquidated damages.

138 Re-D. Q. State whether or not the damages so awarded were paid, and, if so, by whom?

Same objection.

A. They were immediately paid by my solicitor at my request. I handed him my check for the amount and also for the taxed costs.

139 Re-D. Q. What was the difference, if any, between No. II, No. III A and No. III of this composition which you say was made by Suter, Hartmann & Company within the radius of Heinrich Rahtjen's patent of 1873?

A. The difference was that No. II was supposed to contain six per cent. of mercury, No. III A eight per cent. of mercury, and No. III ten per cent. of mercury; whereas, the patent stipulates for seven and one-half per cent. of mercury. The price charged to me for the three different numbers by Suter, Hartmann & Company varied according to the supposed quantity of mercury in the paint, that is No. III A was dearer than No. II, and No. III was dearer again than either.

140 Re-D. Q. The difference then, as I understand you, was a difference in strength merely?

A. That is so.

141 Re-D. Q. How were you able to transfer the good will to Holzapfel & Company?

A. I requested my customers, with most of whom I was on intimate terms, to transfer their custom to M. Holzapfel & Company,
536 subject to the paint giving equal satisfaction to that they had used before, and the majority of them did so, some at once, others by giving my brothers trials and transferring the custom to them after ascertaining the results.

A. C. A. HOLZAPFEL.

Sworn to before me, etc,
ALEXANDER RIDGEWAY,
Notary Public.

Adjourned by consent to 11 a. m., August 15th, to the same place.

AUGUST 15TH, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

FREDERICK TAYLOR, a witness produced on behalf of the defendant, having been first duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

A. My name is Fred erick Taylor, my age is forty-two, and my

residence is the Birkbeck Bank chambers, Southampton buildings, Chancery lane, and my occupation is trade-mark agent, engineer and draughtsman for Messrs. Abel & Imray of that address.

2 Q. How long have you been trade-mark agent and so forth?

A. Exclusively agent of Messrs. Abel & Imray about ten years. I have been with Messrs. Abel & Imray now twenty-seven years.

3 Q. You are fully familiar, are you not, with the practice in regard to obtaining copies of papers on file in the trade-marks office?

Objected to as incompetent, irrelevant and immaterial.

A. Quite.

537 4 Q. Look at the exhibit heretofore offered in evidence marked "Certified Copy Suter, Hartmann & Company's Trade-mark No. 34919, January, 1884." I notice in regard to this paper shown you, that there is no copy or certified copy of the grant of the trade-mark. Will you explain how that occurs?

Same objection.

A. I should say that the reason that the copy of the official notification of registration does not appear with this, is that the office does not grant copies of the certificate of registration to anybody but the owner of the trade-mark. They do grant duplicate certificates, but the application for that must be made by the owner, who has to make a declaration that the original is lost.

5 Q. So that no one could obtain a copy of the grant except Suter, Hartmann & Company or their successors in business owning the trade-mark?

Same objection.

A. That is so, the registered proprietor.

6 Q. Look at "Defendant's Exhibit Certified Copy of Hartmann Brothers' Trade-mark No. 32194 of 1883." I notice, in regard to that, that there is no notice of grant or certificate of grant of the trade-mark. Will you answer as to that?

Same objection.

A. The same as before, if it is a registered mark.

7 Q. Nobody could get that except Hartmann Brothers or their successors in business?

Same objection.

A. The proprietors who are on the register as owners.

8 Q. State whether it is any part of your duties to make searches for grants of patents and the like in the office.

Same objection.

538 A. Oh, yes.

9 Q. You are thoroughly familiar with that business?

Same objection.

A. Yes; as patent agents and trade-mark agents.

10 Q. Have you or not, at any one's request, and, if so, whose,

made a search to ascertain whether any patent in England has been granted to any one by the name of Rahtjen for a composition for ships' bottoms.

Same objection.

A. I have made a search at the request of Mr. Holzapfel; that search I have taken back as far as 1860 from the present time, and I have found during that period one patent in 1873 granted to Rahtjen for a composition for coating ships' bottoms. That is the only one that I have found during that period.

11 Q. Look at "Defendant's Exhibit, Certified Copy of English Patent to Heinrich Rahtjen 3290 of 1873" in evidence and state whether or not that is a certified copy of the letters patent you have made reference to in your last answer?

Same objection.

A. Yes; I should say that is a certified copy of the specification that I have seen and the patent.

12 Q. That is the only one that you found that had been granted?

Same objection.

A. Yes; in the name of Rahtjen.

No cross-examination.

FREDERICK TAYLOR.

Sworn to before me, etc.

ALEXANDER RIDGEWAY,
Notary Public.

539 JOHN HOWDEN, a witness called on behalf of the defendant, having been duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?

A. I am John Howden; my age is fifty-nine; my residence, Newcastle-on-Tyne; occupation, none.

2 Q. You have retired from business?

A. Yes.

3 Q. What was your last occupation?

A. I was secretary to Cleland's Graving Dock and Shipway Company, Limited, ship repairers and engineers, of Willington Quay-on-Tyne.

4 Q. How long were you secretary for that company?

A. Twenty-four years—from 1873 up to 1897.

5 Q. Was it any part of the duties of that company during your connection with it to scrape and paint the bottoms of vessels?

Objected to as incompetent, irrelevant and immaterial.

A. Yes; that was their special business, for the cleaning and painting of vessels and repairing the bottoms, and any other damages that required repairing.

6 Q. Did you have occasion to buy any composition for ships' bottoms in those days—1873 and thereabouts?

Same objection.

A. Yes; whenever it was required we had to purchase it from the people whose composition was specified.

7 Q. Do you know Mr. A. C. Holzapfel here present?

Same objection.

A. Yes.

8 Q. Did you ever purchase any composition from him
540 while he was agent for Suter, Hartmann & Company?

Same objection.

A. Yes; considerable quantities from time to time.

9 Q. Do you remember under what name you purchased it?

Same objection.

A. Rahtjen's composition manufactured by Hartmann & Company.

10 Q. Do you remember whether or not it was represented to be manufactured under any patent?

Same objection.

A. The impression I have is that it was manufactured under Rahtjen's patent.

11 Q. Where was Mr. A. C. Holzapfel's office in those days?

Same objection.

A. Newcastle-on-Tyne.

12 Q. Do you remember the firm of M. Holzapfel & Company, Newcastle-on-Tyne?

Same objection.

A. Yes.

13 Q. That company was formed after Mr. A. C. Holzapfel had ceased to be agent for Suter, Hartmann & Company?

Same objection.

A. I think that is the case, to the best of my knowledge.

14 Q. Do you remember whether or not M. Holzapfel &
541 Company, some years after the firm was formed, made and sold a Rahtjen's composition for ships' bottoms?

Same objection.

A. I think they manufactured a composition under Rahtjen's patent.

15 Q. Do you remember whether or not they made any representation to you or the trade regarding the fact stated by you in your last answer?

Same objection.

A. I believe such an intimation was given, though I do not remember myself how I received it unless I received it verbally. I was

frequently on the quay meeting Mr. Holzapfel, and I dare say he might communicate the fact to me verbally.

16 Q. But in some way you understood, did you not, that it was manufactured under Rahtjen's expired patent.

Same objection.

A. Exactly that. That is the impression I had.

Cross-examination by Mr. MERWIN:

17 X Q. From 1873 till, say, 1880 or thereabouts, do you say that it was represented to you that Rahtjen's compositions were manufactured under a patent?

A. Yes.

18 X Q. How was that representation made to you?

A. It was a general impression.

19 X Q. How did you get it?

A. From the mere fact of it being stated so by the agent.

20 X Q. That is Mr. Holzapfel?

A. He was acting as agent for Suter, Hartmann & Co. at the time.

342 21 X Q. Are you positive now that this fact was called to your attention before M. Holzapfel & Co. advertised the fact that the patent had expired? Was it not that fact, which called to your attention the existence of a patent?

A. No, I do not think so. I think the impression all along was that it was manufactured under Rahtjen's patent and sold to Mr. Holzapfel. In fact, I have some recollection that it was stated so on bill-heads that we used.

22 X Q. Whatever representations were made were made by Mr. Holzapfel?

A. Yes. I was generally engaged on the quay in the morning, and frequently came into contact with Mr. Holzapfel, and, I dare say, there were verbal communications made to me rather than circulars sent out. In fact, the circulars would not be sent out so much to the ship-repairers as to the owners of the vessels.

23 X Q. What was the reputation of Rahtjen's composition sold by Mr. Holzapfel?

A. It was considered very good.

24 X Q. How long did your firm continue to use Rahtjen's compositions manufactured or sold by Suter, Hartmann & Co., or the Suter, Hartmann & Rahtjen's Composition Company, or does your company still use it?

A. It is two years since I left them. I think they were using it up to a very short time of my leaving them.

25 X Q. What brand or name of compositions for ships' bottoms was most prominently identified with Holzapfel & Co. and their successors?

A. I think it is generally known as Rahtjen's composition, Holzapfel's make.

26 X Q. Do you know a brand called the International?

A. I know there was such a thing. I do not know whether it is in existence now or not.

27 X Q. By whom manufactured?

A. I think that was manufactured by Holzapfel.

543 28 X Q. Which was manufactured first by them, the International or Rahtjen's?

A. I think the International.

29 X Q. When did M. Holzapfel & Co. first offer Rahtjen's compositions?

A. I could not say.

30 X Q. When did that firm start in business?

A. I think about 1882 or 1883, or something like that.

31 X Q. To what date was A. C. Holzapfel, agent for Suter, Hartman & Co.?

A. I think about 1880 or 1881.

32 X Q. How long after A. C. Holzapfel ceased to be agent for Suter, Hartman & Co., did the firm of M. Holzapfel & Co. engage in business?

A. I think about two years.

33 X Q. Is that as near as you can state?

A. It is as near as I can state.

34 X Q. If, then, as a matter of fact, one immediately succeeded the other, it would show that your memory on those facts thus long ago is not very distinct now as to time?

A. I am speaking to the best of my recollection.

35 X Q. On account of the time which has elapsed are you positive that the representations with reference to the manufacture of Rahtjen's composition under some patent were actually made to you before the question of the expiration of that patent arose?

A. Yes.

36 X Q. How do you know that fact?

A. From memory.

37 X Q. What have you to aid your memory as to facts occurring 26 years ago?

A. I think I have a recollection that the invoices were made out for a certain amount of Rahtjen's composition stating the quantity at so much per hundredweight.

38 X Q. But those invoices did not say that the composition was made under any patent, did they?

544 A. No, but the invoices I have bore the mark "Rahtjen's patent anti-fouling composition."

39 X Q. But the term "patent" is often used, is it not, with reference to things that are not, in fact, patent?

A. I dare say.

40 X Q. Is that the only means for refreshing your memory that you have as to that fact at that time, 26 years ago?

A. It is rather a long way to carry your memory back, but I have the general impression that the composition manufactured by them was manufactured from Rahtjen's patent.

41 X Q. I understand that, but have you now any way of refreshing or testing your memory as to what you knew at the time, 1873?

A. No; I cannot recollect anything at the moment.

42 X Q. When were you asked to testify in this case?

A. About six weeks since.

43 X Q. Was not this point of the alleged manufacture of Rahtjen's composition under a patent 26 years ago suggested to you in connection with the request that you should certify?

A. No.

44 X Q. How long is it since your attention was called to that fact that there was a Rahtjen patent which this composition was manufactured under, before you came here to testify?

A. I think there was some mention of it made at the time, six weeks since.

45 X Q. I asked was it not suggested to you?

A. No; it was not suggested to me.

46 X Q. Was it not asked of you?

A. No.

47 X Q. Do you mean to say that you have had no conversation about it?

A. I have seen the solicitor this morning.

48 X Q. Is this morning the first time that the matter was mentioned to you?

545 A. No; six weeks since I was asked to give evidence before a commission.

49 X Q. What evidence?

A. I did not know at the time.

50 X Q. Was not the proposed evidence talked over with you at all?

A. What was mentioned at the time was rather a different matter, it was dealing as to certain dates more than anything else.

51 X Q. Not as to the question of the patent?

A. No; not as to the question of the patent.

52 X Q. Then this morning you are speaking for the first time of your memory as to what occurred 26 years ago without anything to aid your memory?

A. I have been thinking the matter over this last hour or so. Of course, I had the preliminaries in my mind.

53 X Q. Who gave you the preliminaries?

A. That was six weeks since.

54 X Q. Who gave them to you, then?

A. Mr. Holzapfel.

55 X Q. What were they?

A. It was a question as to dates, as to when he was appointed agent, and what the paint was represented as, at the time he was their agent.

56 X Q. When was the matter of the so-called Rathjen's patent first called to your attention?

A. Six weeks since.

57 X Q. Who called it to your attention?

A. Mr. Holzapfel. It was either Mr. Holzapfel or his brother, I would not be certain which.

58 X Q. Had anything occurred during the last twenty-odd years

until six weeks ago to cause you to specially remember the fact of that Rahtjen patent?

A. No, just the general impression that was in my mind.

59 X Q. Is it not a matter of fact that it is very hard to recall distinctly when you first had your attention called to that 30 years ago?

546 A. It is rather a hard matter, but I suppose that by thinking the matter over you may get certain impressions in your mind. I may be wrong. I am speaking from a general impression now.

60 X Q. Is there anything now by which you can make certain that you clearly remember being told of a Rahtjen patent before 1880 or at any particular date?

A. Well, I knew that some years since there was some dispute between Holzapfel and Suter, Hartmann & Company as to the selling agency at Newcastle, and I know there were some very sore blows dealt at each other at that time, trying to undersell one another. I was buying at that time occasionally.

61 X Q. That was the suit of 1883?

A. It would be from the time that he took the agency up to the time he left the business.

62 X Q. I am speaking now of when you first had your attention called to it that you can remember distinctly?

A. Remember what distinctly?

63 X Q. The claim that Rahtjen's composition was made under a patent?

A. The impression I have is that it was always understood that this composition was made from Rahtjen's patent.

64 X Q. How did you understand it?

A. Because it was represented so.

65 X Q. Who represented it?

A. By Mr. Holzapfel or his agent.

66 X Q. When first?

A. It would be probably from 1874 to five or six years after that.

67 X Q. Have you anything to aid your memory so as to make you certain as to these dates?

A. No, I have nothing.

68 X Q. What was this patent that you have referred to, to whom was it issued and what was its date?

A. I could not say. I do not know anything about that.

547 69 X Q. How many different kinds of Rahtjen's compositions did Mr. A. C. Holzapfel sell?

A. I think generally two. There were three kinds altogether.

70 X Q. Which were those two?

A. I forget how they were described. I think they were described as Nos. I and II.

71 X Q. Was it represented to you that both of those were made under a patent?

A. Yes.

72 X Q. They were different compositions were they not?

A. They were different because one was usually put on on the top of the other. One was carried a little higher up usually and the other not quite so far up.

73 X Q. But the compositions themselves were different, were they not—the ingredients were different?

A. I could not say anything about the ingredients.

74 X Q. Do you remember whether both were claimed to be manufactured under a patent?

A. I never thought a word about that at all.

Redirect examination by Mr. McMASTER:

75 Re-D. Q. During the time that you were secretary of this company you have mentioned, did you have occasion to receive letters, or invoices, or notes of advice, or any description of communication in writing, from Suter, Hartmann & Company or from their agent A. C. Holzapfel, in regard to Rahtjen's patent composition?

Objected to as incompetent, irrelevant and immaterial and further as not proper redirect examination.

A. I do not remember anything.

76 Q. Did or did not you occasionally receive bills or something of that kind from Suter, Hartmann & Company or A. C. Holzapfel, their agent, in regard to said composition?

Same objection.

548 A. Are you speaking of the first period 1875 to 1880?

77 Q. Yes.

A. Yes; we generally got an invoice and the name of the firm was on the bill-head.

78 Q. Now look at the paper now handed you, heretofore offered in evidence as "Defendant's Exhibit Suter, Hartmann & Company's Invoices of 1877, 1878 and 1879," and state whether that refreshes your memory as to the general manner in which the composition was invoiced to you.

Same objection, and further that the question is leading in character.

A. I think the composition was, for the first period, generally invoiced by Mr. Holzapfel as "Rahtjen's composition." The invoices were made out in the ordinary way, except where there was a contract; we very frequently had to give contracts, tenders.

79 Q. Do you remember whether it was invoiced as this one was?

Same objection.

A. Yes; to the best of my recollection it was invoiced as "Rahtjen's composition."

80 Q. "Rahtjen's composition" or "Rahtjen's patent composition"?

Same objection.

A. "Patent composition." I cannot be certain. If it was not invoiced in that way, it was understood.

JOHN HOWDEN.

Sworn to before me, etc.
ALEXANDER RIDGWAY,
Notary Public.

Adjourned by consent till 12.30 p. m. August 16, 1899.

549

AUGUST 16TH, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

DANIEL STEPHENS, a witness produced on behalf of the defendant, having been first duly sworn, testifies as follows:

1 Q. What is your name, age, residence and occupation?
A. My name is Daniel Stephens. I am fifty-nine years of age. I reside at Corbridge-on-Tyne, and I am a ship-owner.
2 Q. You are the representative of the ship-owners on the River Tyne commission, are you not?
A. I am.
3 Q. And you are a nautical assessor and practical ship-owner?
A. I am nautical assessor for the admiralty court at Newcastle. I am a practical ship-owner in the sense that I have been many years at sea, and therefore know every part of a ship.
4 Q. During the past twenty years you have owned a great many ships?
A. For the last twenty-five years I have owned steamships, and sailing ships before that.
5 Q. During that period you have owned about how many ships?
A. I have built forty ships. I have sold a number, and have sixteen ships at the present time.
6 Q. You are senior member of your firm, are you not?
A. I am.
7 Q. As a ship-owner have you had occasion at any time to paint the bottoms of ships?

Objected to as incompetent, irrelevant and immaterial.

A. A great number of times—hundreds of times.

550 8 Q. That has been so during all the period that you have been in the shipping business?

Same objection.

A. That is so.
9 Q. Did you ever have occasion to use any patent composition on the bottoms of your ships?

Same objection.

A. Years ago we used Rahtjen's patent composition.
10 Q. From whom did you get it at that time?

Same objection.

A. We got it from A. C. Holzapfel. He was agent for it at Newcastle at the time.

11 Q. Did you understand at that time whether or not there was any patent on the composition, or whether it was made according to any patent?

Same objection.

A. I clearly understood that it was a patent; in fact, it was sold to us as Rahtjen's patent composition, and we paid a bigger price for it than we should for other paints at that day.

12 Q. Do you remember the firm of M. Holzapfel & Company?

Same objection.

A. Very well, indeed.

13 Q. Do you remember the fact that they commenced to manufacture a Rahtjen's composition?

Same objection.

A. I remember they issued a circular, the date of which I
351 could not bring home to my mind; but I remember they issued a circular intimating that they were going to manufacture a paint equal in every respect to Rahtjen's patent composition.

14 Q. Did you ever have any conversation with any of the Holzapfels in regard to that matter?

Same objection.

A. Yes; I remember clearly having a conversation with Mr. Max Holzapfel. It would be after the circular. I put the question to him, "How are you going to make a composition after Rahtjen's, which I understood was a patent?" And his reply, which was satisfactory to me, was that the patent had lapsed.

Cross-examination by Mr. MERWIN:

15 X Q. Did you ever hear or know of Rahtjen's composition before you purchased of Mr. A. C. Holzapfel?

A. I did not.

16 X Q. When was it that you first purchased of him?

A. I should say fifteen or twenty years ago. I might say twenty years ago.

17 X Q. How then are you positive that you never knew of Rahtjen's composition before you bought of him?

A. I am almost positive I never used it or heard of it before it was introduced by Mr. Holzapfel.

18 X Q. Did you know Suter, Hartmann & Company?

A. I have known them by name, but I do not know that I have done any business with them.

19 X Q. At how early a date did you first know or hear of Suter, Hartmann & Company?

A. I should say about the same time.

20 X Q. Please name the year, as nearly as you can, when you first knew of Suter, Hartmann & Company?

A. I could not say that; we would have circulars from them in the ordinary course the same as we would from others in the paint trade.

552 21 X Q. How do you know, then, that you did not hear of them or know of them or their Rahtjen's composition before you purchased from Mr. Holzapfel?

A. All I know is that my direct connection with Rahtjen's composition was through Mr. Holzapfel. I would not swear that I never heard the name before. It is such a long time ago that I would not like to say exactly.

22 X Q. Did you pay a high price for Rahtjen's composition as sold to you by Mr. Holzapfel, because it was a patented article, or because you found it to be a better article than cheaper goods?

A. I should say both; first, in buying a patent article you are more likely to get a uniform quality than you are of a thing that is not patented. Then, the proof of the pudding is in the eating of it. The thing turned out to be good, and we continued to use it and paid the price.

23 X Q. The mere fact of the article being patented would not have caused you to buy and continue to use it, if it had not been a superior article?

A. Certainly not. If a thing is brought to me as a patent, and I try it and find it is a failure, then I discontinue using it, but if a thing is brought to me in the shape of paint or anything else, and I find it is all it is described to be, then I am content to pay the higher price. You will see the advantage to a ship-owner of paying a higher price for paint to be used on ships' bottoms; if we took an inferior article, which we have done on occasions, to try it when people have said it is as good as Rahtjen's or as good as Holzapfel's we have tried it, and the result is we have had to dock the vessel twice in twelve months instead of once in twelve months.

24 X Q. The real and the ultimate test is the quality of the article, and not the question of whether it is merely patented or not?

A. That must be so. At the same time, I have more confidence in a thing that is patented and turns out right.

553 25 X Q. Are, or have you been, familiar with Holzapfel's International composition?

A. For many years past—since they first introduced it.

26 X Q. About when was that?

A. I should say the circular was issued about twelve to fifteen years ago. I am not certain of the dates. I have just come up from the West of England, and have not come from my office or I should have got a lot of information that I have not got.

27 X Q. In your answer to X Q. 23 you speak of two kinds of compositions—Rahtjen's and Holzapfel's. When the first term—"Rahtjen's composition"—is spoken of, what is generally understood to be referred to?

A. What I mean by using the expression "the two compositions"

is that we have used many compositions in my experience. We have very frequently friends who come and press us to try a composition; they even do it now. We put on patches on a ship of different compositions to test it with the International.

28 X Q. You have in your answer to X Q. 23 spoken of two different compositions by the terms "Rahtjen" and "Holzapfel." Among the trade what are those terms understood to mean as to the manufacturers or source of those kinds of goods?

A. I cannot answer as to the trade. In speaking of those two compositions let me clearly express what I meant. I meant that when we used and bought Rahtjen's patent composition we frequently tried other compositions on the ships' bottoms, and proved clearly to ourselves that they were not equal to Rahtjen's patent composition. When we used International we did the same thing, and we are doing it very often, and we find the same, that these paints that we are solicited to give orders for and pressed to try are not as good as the International. What the trade knows of the two things I have no knowledge; I am not in the trade.

554 29 X Q. You used those terms as though they were well understood and common terms. If the second term—"Holzapfel's composition" were mentioned to you, what would you understand by it as to the kind of paint or the manufacturer?

A. I should understand that Holzapfel's paint would be his International paint, composed of the same material in every respect as Rahtjen's patent composition.

30 X Q. If I or any one else should speak to you of Rahtjen's composition what would you understand that to mean?

A. I should ask first whether it was Rahtjen's patent composition.

31 X Q. What did you mean, then, when you used that term without any explanatory words in your answer to X Q. 23?

A. I have told you just now what I meant.

32 X Q. By that term what would you understand to be the source or manufacturer, or what did you mean when you spoke of it in your answer to X Q. 23?

A. I meant what I said just now.

33 X Q. Did you not mean when you used those terms the composition manufactured or sold by Suter, Hartmann & Company or their successors?

A. I did not; that was not in my mind at all.

34 X Q. You certainly could not have meant as you used that term "Rahtjen's composition," manufactured by Holzapfel, because you contrasted it with or distinguished it from Holzapfel's composition.

A. Yes, but I was comparing the two dates first when we used Rahtjen's patent composition before Holzapfel made the new composition. I have said distinctly and clearly that we had tried other compositions with these compositions on ships' bottoms at the dates—that is to say, when A. C. Holzapfel was the agent he knows that we tried other patent paints or other paints on ships' bottoms at the same time, and he knows very well that we frequently do; in fact,

his brother, Mr. Max Holzapfel, invites us very often to put it on.

555 35 X Q. Then, if I understand you as you now have explained it, when you used those terms you referred to the Rahtjen's composition which Mr. A. C. Holzapfel used to sell?

A. Yes.

36 X Q. And the International composition afterwards manufactured by Holzapfel?

A. That is so.

37 X Q. Are you or your firm or any one in or connected with your firm anywhere in England in any way interested in a business way with the Holzapfel Company as agent or otherwise?

A. My firm, in which I am a partner, in Newport, Monmouthshire, is agent for Holzapfel's. Personally, I have no interest whatever in any shape or form, merely that I am a partner in the firm in Newport, which acts as agent for them and has done so for eight or nine years perhaps.

38 X Q. I understand you to say that your firm uses the Holzapfel International composition?

A. We do. I should like to explain that my partner at Cardiff is not a partner in my Newcastle firm. I have an interest in the firm there, but he has no interest in the firm in Newcastle, and I have nothing to do with the Newport firm except merely that if there is a loss I pay it, and if there is a profit I share it.

Redirect examination by Mr. McMASTER:

39 Re-D. Q. So far as your knowledge goes, who are manufacturing Rahtjen's compositions today?

Objected to as incompetent, irrelevant and immaterial.

A. As far as I know, Holzapfels are.

40 Re-D. Q. Do you know whether Suter, Hartmann Company, or their successors in business, the Suter, Hartmann and Rahtjen Company, are manufacturing any composition called Rahtjen's?

Same objection.

556 A. I could not conscientiously say they were or were not.

41 Re-D. Q. When you speak of Rahtjen's you mean a composition made in what manner?

Same objection.

A. I know it is made at Gateshead-on-Tyne by Holzapfels with the same ingredients, I understand, as the Rahtjen patent composition was made previously. We find by experience that it is equal in all respects to what we used to have before.

42 Re-D. Q. So that when you speak of "Rahtjen" you mean a composition made in accordance with the Rahtjen patent?

Same objection and further that the question is leading in character.

A. Certainly. In fact we have proved that it is equal in all respects.

43 Re-D. Q. Do you know whether the composition manufactured and sold by Holzapfel & Company and afterwards by Holzapfel's Compositions Company under a title of which the word "Rahtjen" forms part is represented to be the manufacture of anybody in particular?

Same objection.

A. They themselves represent that they manufacture it only.

44 Re-D. Q. As I understand you you have no recollection of hearing of Rahtjen's composition prior to your dealing with A. C. Holzapfel as agent of Suter, Hartmann & Company?

A. I have not.

557 Recross-examination by Mr. MERWIN:

45 Re-X Q. What other brands of composition than Holzapfel's International and Holzapfel's Rahtjen's do you know of?

A. There is a Plymouth firm that manufactured a composition. There are so many that really I could not give you the names from recollection.

46 Re-X Q. Do you know Dick's composition?

A. I do not, but I have heard of it.

47 Re-X Q. Do you know Upas?

A. I have heard of it.

48 Re-X Q. Do you know Nomos?

A. I have heard of it.

49 Re-X Q. Do you know Kirkaldy's?

A. I never heard of it.

50 Re-X Q. Do you know McInnes'?

A. I have heard of it.

51 Re-X Q. Are you familiar or conversant at all with the compositions which are used on any other vessel then your own as, for example, the British navy?

A. I am not; only by report. It does not come under my observation.

52 Re-X Q. Do you know or have you ever heard what compositions are used by the British navy?

Objected to as incompetent, irrelevant and immaterial.

A. I have heard of Hartmann's being used, and I have heard of Halzapfel's being used, and I have heard of several, but I could not swear that they have. As a fact I believe they use more white tallow and zinc than anything else.

DANIEL STEVENS.

Sworn to before me, etc.

ALEXANDER RIDGWAY,
Notary Public.

Adjourned by consent to August 25th, at 11 o'clock a. m., to the same place.

558

25TH AUGUST, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

MR. ALBERT C. A. HOLZAPFEL recalled, and examined by Mr. McMASTER:

1 Q. Defendant was asked after cross-question 103 of your examination, to produce a letter called for in that question, and also in cross-question 121 to produce an agreement called for in that question. Have you made a search, or caused a careful search to be made, for these papers, and with what result?

A. I have made a careful search for the first document and I have not found it. The other, the second document, was not in my possession; it was in the possession of my brothers. They have made a very careful search, according to a letter received from them, and they have also failed to trace it. Before I close I would like to put in evidence one more document which I now produce, being a letter dated 22d of August, 1899, from the deputy director general of stores of the India office, and giving a copy from that office of a letter sent to us on the 14th of July, 1886. The letter, of which a copy is attached, was an appointment of the firm of M. Holzapfel & Co., as contractors of Rahtjen's composition, to the India office, an appointment which they have held ever since, and the firm and its successors, the present defendants, have every year received indents or orders from the said India office.

The foregoing statement is objected to by counsel for complainant as wholly irrelevant, incompetent and immaterial; and further, because it is not proper examination or redirect examination.

559 Defendant's counsel offers in evidence the paper last produced by the witness, and the same was marked "Defendant's Exhibit Letters from India Office."

Same objection.

Defendant's counsel offers in evidence a certified copy of the decision of the Antwerp court in the suit of Rahtjen and others against William Wright, dated March 5th, 1886, and also a certified copy of the decision of the Brussels court of appeals, dated June 24th, 1886, on appeal from the decision in the said case, and the same are marked respectively "Defendant's Exhibit Certified Copy Decision of the Antwerp Court of March 5th, 1886," and "Defendant's Exhibit Certified Copy Decision of Brussels Court of Appeals of June 24th, 1886."

Objected to as incompetent, irrelevant and immaterial.

To save time and expense it is hereby stipulated that if Mr. Russell Martin, of the Victoria translation bureau, was called, he would duly qualify as a person conversant with the French and English languages and competent to make a translation of the said documents, and that he had truly translated the said documents, and that they were as follows (complainant's counsel notes his reservation of right to correction by comparison with the original, and further, subject to objection as being incompetent, irrelevant and immaterial):

560 *The Antwerp Decision.*

The court of commerce, sitting at Antwerp, has given the following judgment:

In the Matter of T. Rahtjen and Suter, Hartmann and Company, Plaintiffs,
versus
W. Wright, Defendant.

Whereas, under the citation of the twenty-ninth of December, one thousand eight hundred and eighty-five, registered, the defendant was condemned to pay damages for breach of faith in opposition;

Whereas, it is certain that the plaintiff, Rahtjen, is the inventor of a special composition for painting the hulls of steamers, which product is known in trade by the name of "Rahtjen's composition," and that he has given over the right of sale of this product to the co-plaintiffs, Suter, Hartmann and Company; that these latter have deposited with the registrar of the court of commerce of Brussels, in conformity with the law of the first of April, one thousand eight hundred and seventy-nine, their trade-mark containing among other things the inscription "Composition;"

Whereas, it is acknowledged that the defendant has put on the sign of his house the inscription "Manufacturers of Rahtjen's composition;" that further, on his prospectus, and by other means of publication, he announces that he sells the "original Rahtjen's composition for ships' bottoms, manufactured by the London Oil and Color Company, Ltd.;"

561

Whereas, the use of the name of the plaintiffs by the defendant constitutes an abuse and an illegal act, calculated to inflict damage on the plaintiffs by leading the public into error and thus forming an illegal opposition to the plaintiffs; that if the plaintiffs have not retained their private right over the composition and the manufacture of their product, as the defendant alleges, the latter does not acquire the right to make use of the name of the plaintiff, Rahtjen, in such a way as to cause the public to believe that his product is the original product of Rahtjen or of his delegates;

Whereas, it is right to condemn the defendant to payment of damages and to order the publication of the present judgment; that no further defenses be made in future except if the plaintiff take a fresh action, should the defendant continue to perform illegal acts which incur damages;

For these reasons:

The court condemns the defendant to pay one hundred and fifty francs (francs 150) damages to the plaintiffs for illegal opposition, with legal interest and costs;

And authorizes the plaintiffs to cause to be published the reasons and effect of this present judgment in three Belgian newspapers, according to their own selection and at the cost of the defendant, the said costs being recoverable by presentation of simple receipts;

And declares the present judgment valid for execution in spite of appeal and without bail.

Thus judged and pronounced in public audience extraordinary of the first chamber of Friday, fifth of March, one thousand eight hundred and eighty-six.

Present: Messieurs E. Lambrecht, president; Walther, judge; F. Fassbender, deputy judge; G. Spee, registrar.

In faith of which the present judgment has been signed and sealed with the seal of the court.

562 For correct extract,

The registrar of the tribunal of commerce,

ALF. AYON.

[Seal of Tribunal of Commerce, Antwerp.]

Registered 30th August, 1899; fifteen francs.

Stamp	2 60
Regis	15 00
	17 60
Lip	0 25
No. 5814, 5815.	17 85

Seen for legalization of the signatures of Mr. Alf. Ayon, doctor of law, registering clerk at the court of commerce of Antwerp.

The vice-president, JULES CARPENTIER.

UNITED STATES CONSULATE GENERAL,
ANTWERP, BELGIUM, *September* 1, 1899.

Seen for the legalization of the signature of Jules Carpentier, vice-president of the tribunal of commerce, and the seal of said court.

[U. S. Consular Seal.]

GEO. F. LINCOLN,
U. S. Consul General.

The Decision on Appeal.

Copy from the minutes of the registry of the court of appeals sitting at Brussels, fourth chamber, No. 8165, in the case of William Wright, victualler, residing at Antwerp, appellant, from a judgment of the tribunal of commerce of Antwerp of the fifth March, eighteen hundred and eighty-six, represented by Mr. F. Mahien, advocate—pleaders, Messrs. G. and P. Leclerq, advocates—

563 against, 1st, Jean Rahtjen, manufacturer, residing at Hamburg; 2nd, Suter, Hartmann & Company, merchants, residing at London, associates, represented by Maître Duvivier, advocate; pleader, M'tre Ch. Dejongh, advocate.

The court gives the following decision:

As the action of the associates is founded on acts constituting a breach of faith, consisting, according to them, of the erection of a

sign over the house of the appellant, and of circulars sent out by him;

As the associate Rahtjen is the inventor of an anti-corrosive varnish for painting the hulls of ships known by the name of "Rahtjen's composition;" that he has given over the right to trade in this product to the associates Suter, Hartmann and Co.; that the parties agree in recognizing that the patent taken out by Rahtjen has expired, and that his invention has become the property of the public;

As the objectionable sign runs as follows: London Oil and Colour Co.: ship painters, W. Wright, manager, manufacturers of Rahtjen's composition;

As in his circulars, already brought up for judgment, from which appeal has now been made, Wright announces to the public that he sells "The original Rahtjen's composition," manufactured by "The London Oil and Colour Co.," and that this composition is strictly in conformity with the recipe deposited by Rahtjen in the Patent Office;

As it is the case, that if the name of a person constitutes a thing his exclusive property, it may happen, however, that, in consequence of general usage, the name becomes the ordinary designation and is received as such as applied to such process of manufacture or to such a product which has become the property of the public with which product it is completely identified.

564 As the manufacturers authorized to manufacture and to sell the product which has thus become the property of the public are in consequence authorized to offer it for sale under the name generally used to describe it, because any other name would completely mislead the purchaser, always supposing that the public is not to be led astray as to the individuality of the manufacturer, or as to the source of the said products;

As it is shown by the documents deposited in the present process that the varnish invented by the associate is generally known in England and in Belgium under the name of Rahtjen's composition; so that in the eyes of the public this name of Rahtjen has become a sort of qualifying adjective indicative of this special product;

As the appellant has always in his sign and in his circulars been careful to announce that the product that he sells was manufactured by the "London Oil and Colour Company;"

As he has never tried to lead the public into error concerning the source of his Rahtjen's composition; and as the purchasers never could have believed that the appellant professed to be the successor of Rahtjen, as manager of a factory, or of a branch established by Rahtjen at Antwerp, or as selling varnish claiming to be manufactured by Rahtjen himself;

As it results from all the foregoing that the intention or bad faith which constitutes an element necessary to the establishment of breach of faith has no actual existence:

For these reasons, the court, having heard the opinion of the advocate general Staes, rejects the cross-appeal, and, deciding on the principal appeal, reverses the judgment from which the appeal is made; the reversing judge declares the action of the associates un-

founded; nonsuits them and charges them with costs in both instances.

Thus judged and pronounced in public audience of the court
565 of appeals sitting at Brussels the twenty-fourth of June, one thousand eight hundred and eighty-six, the following persons being present: Messieurs Motte, president; Aulit, Pecher, Messiaen, Petit; councillors Janssens, substitute for the procureur general; Houyet Greffier.

MAX MOTTE A. NOUYET,
For Correct Extract Delivered to Mr. Franken, Advocate for the Chief Registrar (Greffier),
The registrar, F. RAEYMAECKER.

5208. Registered at Brussels, A. J., the first September, 1899, vol. 268, 100, 6 containing 5 sheets returned.

Received for registration fee 7 sheets..... } 27.00
And registry 20 sheets..... }
Twenty-seven francs.

The receiver, A. JAUMELLE.

5208. Seen by us president at the court of appeals sitting at Brussels, for legalization of the signature of the registrar Raeymaecker affixed above.
Brussels 2 Sept. 1899.
[Seal of Court of Appeals.]

J. MESSIAEN.

Seen at the ministry of justice for legalization of the signature of Mr. Messiaen herewith.
Brussels, 2 Sept. 1899.
[Seal of Ministry of Justice.]

E. FRANCOIS.

Seen for legalization of the signature of Mr. Francois.
Affixed —. Dated Brussels the 2nd September, 1899.
For the minister of foreign affairs.
[Seal of Minister of Foreign Affairs.]

The director general, ALFRED VANDEN BULCKE.

566 UNITED STATES CONSULATE, *Brussels, Belgium.*

I do hereby certify that the annexed seal and signature are those of Alfred Venden Bulcke, a director of the bureau of foreign affairs, Brussels, and that to all officials acts, thus attested full faith and credit are and ought to be given.
Witness my hand and official seal, this fourth day of September, eighteen hundred and ninety-nine.

GEO. W. ROOSEVELT,
United States Consul.
[U. S. Consulate Seal.]

Defendant rests.

Circuit Court of the United States for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainants,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendants.
} In Equity.

Surrebuttal proofs for final hearing taken on behalf of the defendant pursuant to stipulation heretofore entered into without further notice (such notice being waived) forthwith upon conclusion of the complainant's rebuttal proofs, at room 10, in the Cannon
567 Street hotel, in the city of London, England, on this 4th day of September, 1899, commencing at a quarter past five o'clock.

Present: T. D. Merwin, Esq., of counsel for complainant, and R. B. McMaster, Esq., of counsel for defendant.

Defendant's counsel states that he desires to take the testimony of Mr. Holzapfel and other witnesses in surrebuttal, of proofs offered on complainant's rebuttal that labels were attached to the composition sold or used; that the marks on the casks testified to by complainant's witnesses were not in reality the marks and stencils used on such casks; also that he desires to introduce proof to rebut the testimony of Mr. John Rahtjen in reference to the suit in Hamburg.

Complainant's counsel objects to the reception of any such evidence as stated by defendant's counsel for the reason that evidence of the character of that first named is wholly incompetent at this stage of the proceedings, being matter which should form part of the defendant's case-in-chief; that as to evidence on the second point stated by defendant's counsel, the same is wholly incompetent in surrebuttal for the reason that the evidence originally adduced by defendant as to said suit was wholly incompetent, irrelevant and immaterial to the issues of this case, and was received only subject to proper objection, and that the evidence adduced by complainant subject to such objection was to contradict the truth of said evidence. Therefore, complainant's counsel gives notice that by attending to the taking of such proposed evidence he does not waive any right to the same, and that he will at the hearing of this cause move
568 the court that all such evidence offered in surrebuttal be stricken from the record.

Mr. A. C. A. HOLZAPFEL, called as a witness in surrebuttal by defendant, being first duly sworn, testifies as follows, in answer to questions propounded to him by Mr. McMaster:

1 Q. You are Mr. A. C. A. Holzapfel who was previously examined as a witness on behalf of the defendant in this cause, are you not?

All questions that are propounded to this witness are subject to the objections above noted.

A. Yes.

2 Q. Did you hear the testimony given by Mr. John Rahtjen and Mr. William Hartmann in reference to the use of labels on the drums, barrels or casks containing Rahtjen's composition?

A. I did.

3 Q. Was that testimony true?

A. I can speak in particular only so far as the packages containing Rahtjen's composition came under my notice. This was first in 1874, in Liverpool. At that time Suter, Hartmann & Co., Liverpool, manufactured the composition from paste imported from Mr. Rahtjen in Germany. The composition so made was sent all over England, and during the majority of my stay with the firm in Liverpool was marked by myself. During the rest of the time the packages so marked also came under my notice, because I had the forwarding of them to the various ports in the United Kingdom where there where agencies. In no case have I seen a label on such casks, nor did I receive any such instructions to put such labels on the casks, nor did I see during my stay in Liverpool such a label as was sworn to by Mr. John Rahtjen and Mr. William Hartmann. During my subsequent connection with the firm as agents in Cardiff
569 and Newcastle the goods received by me had no such labels affixed to them, nor did I see casks with such labels affixed in the various other ports in the United Kingdom which I visited from time to time. I speak up to November, 1881, when I severed my connection with the firm. What happened after that I cannot vouch for. I never had any labels sent to me nor any instructions given to me in regard to them.

4 Q. During the time of your agency for Suter, Hartmann & Co. did you have occasion frequently to visit their offices?

A. I frequently called at their office in London. I also visited the Liverpool office in 1881.

5 Q. Did you on any of those occasions see any of these labels at their office, or did you ever learn of such labels being in existence before the testimony which you have heard given here?

A. I did not.

6 Q. Have you heard the testimony given by Mr. Rahtjen and the two Messrs. Hartmann in reference to the stencilling employed on the barrels, casks or drums?

A. I have.

7 Q. What can you say in reference to that? Is that testimony correct?

A. I refer to Complainant's Exhibit Photographs K K^1 and K K^2. I say that the lower half of the first is a correct reproduction of the marking as it came under my notice, but the upper half is not a correct reproduction of the marking of the vessels containing Rahtjen's composition which I had seen prior to the end of 1881. In regard to second photograph the lower half constitutes the correct marking of two ends of a barrel or keg of No. III, the words "S. H.

& Co., 150 Trieste," being on one side, and the Roman "III" with the words "Stir well before using," underneath, being on the other side. This was the marking of the vessels or barrels which I saw from 1875 onwards to the end of 1881, during the whole of my
570 connection with Rahtjen, and it has reference not only to the marking of the composition by Mr. John Rahtjen, but also by Messrs. Hartmann Brothers subsequently.

8 Q. While you were in Liverpool in the employ of Suter, Hartmann and Co. did you see any stencils like the upper part of the photographs K K^1 and K K^2 or either of them?

A. At that time we used no stencils at all, the barrels being marked by hand.

9 Q. How were they marked?

A. They were merely marked with the No. I and the No. II, and the port of destination.

10 Q. Were they marked with any initials?

A. About that I cannot swear positively. They may have had the initials "S., H. & Co.," but this is a point I do not recollect.

11 Q. When did you first see a stenciling similar in all respects to that shown in the upper half of the Photograph Exhibit K K^1?

A. I cannot say I saw a stenciling exactly like that at any time in practical use, but the words "Rahtjen's anti-fouling composition" to my knowledge were not adopted as markings on the casks till 1883 by Suter, Hartmann & Co.

12 Q. That is, as I understand you, during your connection as agent or otherwise with the firm of Suter, Hartmann & Co., they never used the words "Rahtjen's anti-fouling composition" on their barrels, casks, or the like?

A. Such words never came under my notice; in fact, the composition was called "Rahtjen's patent composition" till 1883.

13 Q. Did the words "Rahtjen's composition," or the word "Rahtjen" appear anywhere in the stenciling or other marks on the casks, barrels, and the like, containing this composition during the term of your connection with Suter, Hartmann & Co. either as an employee or as an agent?

571 A. In no case have I seen a package containing Rahtjen's composition with the stencil mark "Rahtjen's composition," or with any label having such a word printed on it.

No cross-examination.

A. C. A. HOLZAPFEL.

Sworn to before me, etc.

ALEXANDER RIDGWAY,
Notary Public.

Defendant's counsel offers in evidence a certified copy of the decision given in the Hamburg suit, about which Mr. John Rahtjen testified, and the same is marked "Defendant's Exhibit, Certified Copy Decision in German Suit."

Complainant's counsel makes the same objection to the production of this document as has been heretofore made to the deposition of the witness Holzapfel, and it is further objected to that it should

have been offered, if at all, as part of defendant's proofs-in-chief; wherefore, for these various reasons, the same is objected to as incompetent, irrelevant and immaterial, and the notice heretofore given as to motion to strike out is repeated as to this.

To save time and expense it is hereby stipulated by counsel for both parties that if J. E. Newton were called and examined as a witness he would testify that he was a professional translator in the Victoria School of Languages, Limited, 84 Chancery lane, London, and conversant with the German language, and competent to make a true and correct translation therefrom, and that he had read and translated the decision of the Hamburg court just offered in evidence as an exhibit, and that a true and correct translation of the same was as follows:

572 All papers filed in reference to this matter should be marked as under B. IV. No. 2515/96.

(Bailey's office stamp, date 1 Dec. 8th, '97.)

In the criminal matter against, 1, Claus Rudolf Johannes Joost, born May 3rd, 1865, at Hamburg, residing at Hamburg, agent; 2, Johann Hermann Friedrich Schultz, born October 17, 1850, at Hamburg, residing at Altona, gentleman; 3, Max Holzapfel, of No. 1 Fenham terrace, Newcastle-on-Tyne, England, merchant, for offences under section 14 of the law for the protection of merchandise marks of May 12, 1894.

The criminal chamber IV of the "land" court at Hamburg at the sitting of the 26 November, 1897, at which there attended:

1. Dr. Danzel, director of the land court,
2. Dr. Schultz, land court judge,
3. Schiefler, land court judge,
4. Ipsen, land court judge,
5. Dr. Ewald, land court judge, as judges.

Dr. v. Bergen, attorney for the crown as a treasury official,

Tügel, clerk to the court as clerk.

Have ruled to be right in law as follows:

The defendants Joost, Schultz and Holzapfel are acquitted of the charge brought against them.

The treasury are ordered to pay the costs of this action.

573 *Grounds of the Judgment.*

At the chief trial the following facts have been elicited:

There exists in England a mercantile company styled Holzapfel's Compositions Company, Limited, carrying on the manufacture and sale of ships' paint. One of the directors and cofounders of the company is the defendant Max Holzapfel. The chief place of business of the company is at Quayside, Newcastle-on-Tyne. The company manufactures and sells various kinds of paints for ships, describing them as "International anti-fouling composition," "National anti-fouling composition," "Holzapfel's patent soapstone composition," "Danby's anti-corrosive composition," and, lastly—

and this is the only variety involved in the present action—a paint described "Genuine Rahtjen's patent composition." The circumstances connected with the origin of this last-mentioned designation are as follows:

Inasmuch as ships' bottoms, and in particular those parts of the modern iron ships which come in contact with water, cannot be protected by painting with the ordinary oil paint known of old, from rust, and particularly from the adhesion of shells, there has for a long time been a tendency in specialists' circles to discover a method of preparing some paint of a different kind which, upon being applied to the iron of ships, may lead to the result just stated. The first person who succeeded in solving the problem in a satisfactory manner was the father of Mr. Johann Rahtjen, a Hamburg merchant, who prepared a composition of alcohol, shellac and a whole series of other substances, some of a strongly poisonous character. That gentleman, Heinrich Rahtjen, for a long period continued the sole manufacturer of the paint in question, which was named by him "Rahtjen's composition" or "Original Rahtjen's composition for ships' bottoms, &c." On the 29th November, 1873, the said Heinrich Rahtjen obtained a patent in England for that paint,
574 under the title "Preservative composition for ships' bottoms, &c." Owing, however, to the negligence of one of Heinrich Rahtjen's agents, who omitted to pay the tax under the patent law, that patent lapsed somewhere about the year 1880. The manufacture of the paint in accordance with the patent therefore became public property; and it was precisely in view of this fact that Holzapfel's Compositions Company, Limited, was formed at Newcastle in 1883. In Germany neither Heinrich Rahtjen nor his son Johann Rahtjen ever held a patent, but Johann Rahtjen, the son of, and successor in business to, his father, had a trade-mark consisting of the presentation of the palm of a right hand painted red and surrounded by the words:

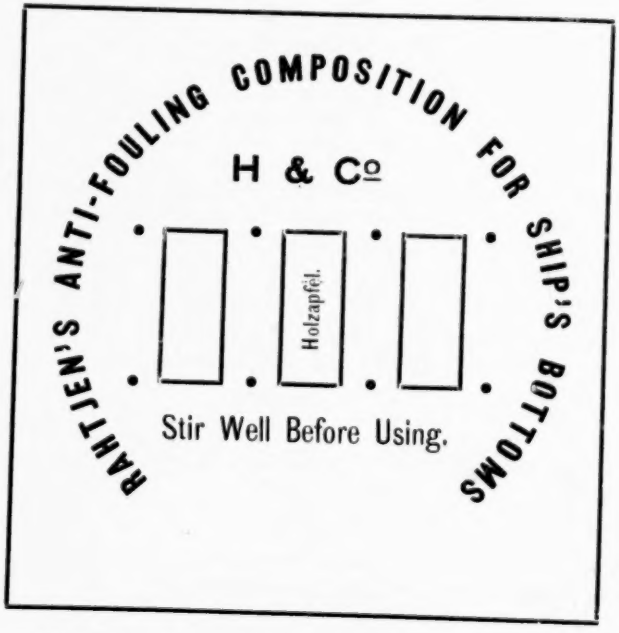
ORIGINAL

RAHTJEN'S COMPOSITION

TRADE { Symbol of Red Hand } MARK.

FOR SHIPS BOTTOMS ETC.

entered under date of the 4th of August, 1883, in the trade-mark register kept at the chamber for commercial matters at Bremerhaven, where the works were situated at the time. Precisely the same trade-mark was since—on the 23d of October, 1895—entered
575 in the trade-mark register of the imperial patent office, numbered 10442 (class 11), on behalf of the firm of Jno. Rahtjen, of Bremerhaven and Hamburg. The paint or composition manufactured by Rahtjen is thus protected. But latterly—though only after the expiration of the period we have here to consider—the name "Rahtjen" itself has been registered at the German patent office as a trade-mark on behalf of Joh. Rahtjen, the application being dated April 22, 1897, and the entry having been made June 10, 1897. Now, the appearance of the English trade-mark, which was registered on the 21st of April, 1883, on behalf of Holzapfel & Co., of Liverpool, which subsequently developed into the Holzapfel's Compositions Company, Limited, is totally different, that mark representing a black square, within which the following words are inscribed in white letters:



576 When the registration of this trade-mark was notified to the public in the English official "Trade Marks Journal," Johann Rahtjen entered an opposition against it on the ground that his name appeared in trade-mark. Max Holzapfel was accordingly advised by the office that the opposition could not be disregarded unless Messrs. Holzapfel & Co. waived the right to the sole ownership

of the name "Rahtjen." Holzapfel's statement to that effect stands unrefuted. Max Holzapfel further states that, upon his having made the disclaimer required, the trade-mark in question was finally entered in the English trade-mark register, Johann Rahtjen's opposition notwithstanding. Later on Holzapfel's Compositions Company, Limited, caused another trade-mark to be registered in its name, being the representation of a red four-bladed propeller screw, and this trade-mark the company now uses upon all its manufactures, price lists, circulars, letter headings, &c., side by side, with which it continues to use Holzapfel & Co.'s trade-mark. Holzapfel's company were entitled to include Germany in its sphere of business, and it accordingly set up a branch establishment at Hamburg in the year 1895. From the 1st of February, 1895, to the 1st of February, 1896, the Holzapfel company's Hamburg agent and representative was the defendant Schultz, a former sea captain, and from the 1st of February to the 30th November, 1896, that post was filled by the defendant Joost. The appointment of both Schultz and Joost as its agents, the Holzapfel company represented by the defendant Max Holzapfel, announced to the section of the Hamburg public interested in such matters by means of circulars which were printed upon sheets of letter paper having, as is usual in advertisements of this kind, the signature of the firm impressed upon them. The company at the same time forwarded to Schultz a large quantity of printed matter for advertising purposes, which he distributed among the parties concerned, such as ship-builders, captains, ship-inspectors, ship-owners and the like, whom he approached with a view to
577 business. What remained of such printed material was taken over by the defendant Joost when he assumed the agency on the 1st of February, 1896, and he also distributed it by way of advertisement in a like manner in circles interested in the subject. The introduction of his manufactures in Hamburg, Max Holzapfel found to be a somewhat slow affair. No goods at all were ever sent to the defendant Schultz; and it was not until after the 1st of February, 1895, that some goods were forwarded to the defendant Joost, who had succeeded in effecting certain sales. All that Max Holzapfel sent Joost, between the 1st of February, 1896, and the 30th November, 1896, as all the defendants state, and their statement appears creditable, was—

500 kilogrammes of Rahtjen patent composition No. 1 (known as "Priming"), and

500 kilogrammes of Rahtjen's patent composition No. 3 (known as "Anti-fouling").

Of this 1,000 kilogrammes Joost sold 455 kilogrammes. On the other hand, there was sent to Joost 36,300 kilogrammes of other products of Holzapfel's, of which he sold 28,595 kilogrammes. The 455 kilogrammes of Rahtjen's patent composition he disposed of to certain Danish ship-owners, a few of whose ships plied to Hamburg.

The 455 kilogrammes were already sold when on the 23rd of November, 1896, Johann Rahtjen brought a criminal action against Joost for offences under the merchandise marks law of May 12, 1894, section 14. The remaining 1,000 kilogrammes were confiscated by

the police on the same day, in a yard at Steinwärder Norder (or Neuer) Elbstrasse, where the paint was stored upon Joost's account.

Now, in the indictment it is laid to the charge of Max Holzapfel and Joost—the former in respect of the period from the 1st of February, 1895, to the end of November, 1896, and the latter in respect of the period from the 1st of February, 1896, to the end of Nov., 1896—

578 that they, with guilty knowledge had at Hamburg, marked goods, or the packing of goods together with announcements, price-lists, business letters and inducements to purchase, with the name of the merchant Rahtjen, in contravention of the law, and had further illegally brought goods, so marked, into the market. Schultz is charged with having, during the time from the 1st of February, 1895 to the 1st of February, 1896, with guilty knowledge and in contravention of the law, marked announcements, price-lists, business letters and inducements to buy, with the name of the said merchant Rahtjen. Therefore, the three defendants are jointly charged with offenses under section 14 of the (German) merchandise marks' law of May 12, 1894. Seeing that section 14 of the law invoked, enacts penalties against any person who illegally provides packings, announcements, price-lists, business letters, inducements to buy, bills, invoices or the like, with the name of another, or who brings goods thus illegally marked into the market or offers them for sale, it might at first sight appear as though any conscious, unauthorized use of the name of another, in marking goods, had been intended to be prohibited, irrespective of whether the use of the name is, or is not, apt to lead to confusion or misapprehension as to the quality and source of the goods. Such a broad interpretation of the prohibition enacted by the criminal law is, however, controverted by the tendency (or spirit) of the law which the imperial court in its judgment quoted on page 332, volume 29, of "Decisions in Criminal Matters," states to be as follows: To prevent, in the interest both of traders and customers, any goods from being by an abusive designation, with a name other than that of their producer, given the appearance of standing in such a relation to the bearer of the name used as is material to the estimation of the quality of such goods, and such as does not in reality exist. This intention of the law finds expression in a particularly lucid form, in section 20, which provides: That the application of the provisions of this law is not exclusive of those cases where the name of a stranger, &c. is

579 reproduced with variations, provided that notwithstanding such variation the risk of confusion by the trade subsists. This negative form which has been selected for the purpose of circumscribing the sphere which the law in question was intended to control, surely justifies the positive conclusion that there is no ground, objectively, for a criminal action within the meaning of the law, where the names of other persons are reproduced in characterizing or designating goods with such differences as preclude any risk or a confusion arising between the producer or seller of the goods in question, and the actual owner of the name used, or in other words, where the fact of goods or commercial papers being marked with a stranger's name is not calculated to induce the belief that the

goods come from the person whose name is used, if the quality of such goods is to be estimated by the same standard by which goods of the like description are generally judged when supplied by the actual bearer of the name. In accordance with this principle the imperial court has indeed ruled, in the judgment cited above, that any such risk of confusion appears to be obviated in those cases where the name of another person is only used for the purpose of intimating that certain goods resemble an original preparation, either in regard to the method of their manufacture, or in regard to the material used in making them, and that consequently an estimation of their quality by the same criterion by which the original goods were judged, is claimed. Whether in any individual case goods have been so characterized or whether the use of the name of another can give rise to the idea that the goods stand in any particular relation to the bearer of the name used, are entirely matters to be decided by a survey of the facts of the case. If these principles be applied to the case now under consideration, what has to be ascertained first of all, is, in what particular form the name of Rahtjen has been used by the defendants upon goods, packing of goods, lists of goods, price-lists, &c. But in the first place, an argument adduced in defense of
580 the defendants and especially in defense of the defendant Max Holzapfel must be rejected as irrelevant. It is to the effect that the description "Rahtjen's patent composition" is to be considered as common property because it has become a generally accepted description of ships' bottom paint, prepared with alcohol instead of with oil—*i. e.*, a generic term—or, in other words, a name which by trade custom serves to designate ship-bottom paint without being intended to ascribe any special source (or in particular Rahtjen's works) to such paint. The two experts who have been heard have both declared that this is not the case, and that there existed many ship-bottom paints manufactured on the same or a similar principle which are not described as "Rahtjen's patent paint" or "composition." As a generic term for such paints the expression "patent paints," or "patent composition" appears alone to have become usual, while the several manufacturers append their own names to this designation in order to show that what they offer is a patent paint produced by them as a specialty of their own. Thus, for example, we have Hoeveling's patent paint or Dr. Pflug's patent paint. In the advertising material confiscated on the agent Joost's premises which had been forwarded from England by Max Holzapfel to the defendant Schultz, and had been used by the latter and by Joost for business purposes, the name "Rahtjen" occurs in the following forms and combinations:

1. On sheets of letter paper. These bear on the left-hand side a boldly printed stamp of the firm broadly displayed and elaborately ornamented. Under the picture of a docked ship there is conspicuously reproduced the trade-mark representing a red four-blade propeller screw. Under this is the name or style of the firm "Holzapfel's Compositions Company, Limited." Then some medals, and under

these a list of the goods on sale, among which is included "Genuine Rahtjen's patent composition."

581 2. In an English-printed document described as "Instructions to agents," there is mentioned among the goods specified on page 4, which the Holzapfel Company have for sale, "Rahtjen's patent composition," on pages 15 to 19 in the letter press, and across the margins of the pages, also, the words "Rahtjen's patent composition."

3. On the back of a circular praising the goods (printed on single sheets) the goods are enumerated, and those now under consideration referred to in the following form: "Manufacturers of genuine 'Rahtjen's patent' composition, warranted made according to Rahtjen's original specification."

4. On the back of a printed leaflet entitled "Testimonials, Reports of Surveys, &c.," in the English language, which contains letters of acknowledgement, the goods offered for sale by the Holzapfel Company are also enumerated, and among them occurs "Rahtjen's patent composition," worded precisely as quoted in paragraph 3.

5. In an advertising booklet of the Holzapfel Company, printed in English, French and German, the goods in question are recommended. The sense of all the statements made in praise of the goods is precisely alike in the several languages, and in German they are worded as follows: "Original 'Rahtjen's patent' paint for ship bottoms, manufactured strictly in accordance with the inventor's original patent. Numerous inferior imitations of this brand are brought before the interested public as genuine, but in order to secure our friends against deception we ask them to demand 'Holzapfel's manufacture' in any orders not addressed to us direct, and to see that the vessels are provided with our trade-mark, protected according to the law, of which a representation appears on the other side, as a guarantee of the genuineness of the article. Trade (propeller) mark." On page 14 of the same booklet are given samples of colours, and over them are printed the words "Genuine Rahtjen's" patent composition, while on the opposite page, entitled "Price-list," the goods are again described as "Rahtjen's patent composition."

582 It would appear that the final quotation mark placed after the word Rahtjen instead of after the word "patent," on page 14, is simply a printer's error.

6. Upon the japanned sheet-metal barrel which has been confiscated and produced in court, the following marks appear on the front surface:

Gross 59
Nett. 50
kilos.

H. C. Co. Ld.
C. 28113.

F 2

Hamburg.

and on the back

{Symbol of propeller.} Rahtjen's {Symbol of propeller.}

I

Priming

composition.

Stir well

before using,

and on the left and right of the word Rahtjen's a red four-bladed screw-propeller.

On the lid of pressed sheet metal are written in a circle the following words, legible with difficulty:

583

There are illegible words in two places.

Now, in the opinion of this court, the employment of the name of Rahtjen in the cases referred to in paragraphs 2, 3, 4, & 5, nowhere constitutes an objective infraction of section 14 of the imperial law of May 12, 1894. All of the four prints which are reputed to be "announcements, price-lists and inducements to buy," within the meaning of the imperial law, must be regarded as such and as coming from the English "Holzapfel Company, Limited." Now, if that company, in the instructions to its agents, mentions and recommends "Rahtjen's patent" composition, the quotation marks in which the words "Rahtjen's patent" are placed, convey, to any interested party,

no other meaning than that the composition recommended is manufactured in accordance with Rahtjen's patent. That it can possibly be a preparation of Rahtjen himself, this form of expression is not likely to suggest to any person belonging to the class among
584 whom such goods are sold. It is perfectly certain, too, that no such idea occurred to the agents for whose guidance the instructions were intended. And yet they are actually charged with having assisted in bringing about that possibility of confusion which is alleged to exist by the plaintiff. The assumption that the goods recommended are supplied from Johann Rahtjen's works is even more decidedly discarded by the wording of the phrases cited in paragraphs 3 & 4, because here the Holzapfel Company expressly calls itself "Manufacturers of genuine Rahtjen's patent paint," and adds "Warranted made according to Rahtjen's original specification." This addition removes any doubt as to the goods offered not being Rahtjen's manufacture. Besides, this addition is conformable to the truth. The witness Rahtjen himself states that the defendant Max Holzapfel doubtless manufactures the paint according to the original patent recipe of his (Rahtjen's) father, which he has found in the specification. In view of this, it is hardly necessary to call special attention to the fact that the defendant Holzapfel has been most energetic in his endeavor to remove by means of the print referred to in paragraph 5 any doubt as to he himself being the manufacturer of "Rahtjen's patent" composition. For, in conclusion, he actually refers to his own trade-mark, and recommends customers to specially ask for "Holzapfel's" manufacture. Besides, all the printed material referred to in paragraphs 2, 3, 4 and 5, is prepared in such a manner that these distinctions in the use of the word "Rahtjen" cannot be overlooked. Where, therefore, the name of "Rahtjen" is so used, the possibility of that portion of the public which may be desirous of purchasing goods of this kind being misled as to the origin of the goods, is out of the question. The objective state of things contemplated in section 14 does not exist. Hence, a conviction of the three defendants cannot be based upon their having made use of the name of Rahtjen in this form.

On the other hand, the court does not overlook the possi-
585 bility of confusion afforded by the impressions of the name of the firm appearing on the note paper and by the description of the goods appearing on the packing, and that an idea that the goods come from the works of the noted inventor of the patent paint, *i. e.*, Rahtjen's works, is not altogether unlikely to occur. Schultz has disputed this possibility of confusion, and this is what he relies upon in contending that no one could be misled by the letter-headings used both by himself and by Joost. He alleges that, during the whole time that he was agent for the Holzapfel Company, he had been on friendly terms with the confidential clerk of Johann Rahtjen, the plaintiff, and that he had repeatedly communicated with him by letter. In doing so he had invariably used that note paper. But that the firm of Johann Rahtjen had never taken any notice of the fact that there appeared in the heading, among other things, the words "Genuine Rahtjen's patent composition." This must evidently have

escaped the attention of Rahtjen's chief clerk, because the incriminating words upon the note paper were printed over with a deep red shading which made it difficult to read them. This is correct, and may be the reason why the firm of Rahtjen, or their managing clerk, had not noticed the announcement concerning Rahtjen's patent composition. Rahtjen himself, in his evidence as a witness, has indeed stated that he did not become cognizant of the sale of the goods in question until a short time before the institution of this action. But whoever takes time to read the heading on the letter paper must see thereon the description of the goods in question. The error of assuming from the letter-headings that the Holzapfel's Compositions Company, Limited, was recommending for sale goods manufactured at Johann Rahtjen's works, does not therefore appear to be impossible. And the same remark applies to the superscription upon the packing of the goods, *i. e.*, upon the japanned metal barrel. It has already been pointed out that the words reproduced on the lid by pressure were not, on the whole, difficult to decipher. Any person glancing at the barrel
586 cursorily must certainly be struck first of all by the inscription in large letters which reads "Rahtjen's priming composition," and this inscription is indeed calculated to give the impression that the contents are Johann Rahtjen's manufacture. For, while the barrel is also marked with Holzapfel's trade-mark and with the letters H. & Co., Ld., in front, these things do not amount to such differences as would at once dispel any error such as has been alluded to, more especially as the word Hamburg also appears on the barrel front. This name of a locality surely at the first blush suggests an article of German manufacture, and, if taken in conjunction with the inscription on the back of the barrel, points specially to Johann Rahtjen. The court, therefore, holds that it has been shown that the business letter headings and the packing of Holzapfel's goods have been marked with Rahtjen's name illegally, and that Max Holzapfel and Joost have introduced into the market and put up for sale in Germany goods thus illegally designated. This notwithstanding, the court is unable to convict the defendants on subjective grounds. Neither Max Holzapfel nor his two codefendant agents were conscious of any such illegality in making use of the name of Rahtjen on their letter headings and packing. Rather is there good reason for believing that they were confident of having chosen a designation which obviated the mistaken assumption that the goods emanated from the works of Johann Rahtjen. Max Holzapfel, who is a British subject and has resided in England for sixteen years, has marked the packing of his goods not only with the initials of his company (H. & Co., Ld.), but also with his trade-mark placed next to Rahtjen's name. Again, he has included his trade-mark in the matter printed as a heading on his paper. This trade-mark is totally unlike Johann Rahtjen's trade-mark, of a red hand. Now, it is not to be supposed that a man who, in his printed circulars and prospectuses, seeks with the energy which has before been noticed
587 to attract attention to himself as the manufacturer of "Rahtjen's patent composition," can have conceived the idea that

the words printed upon the packing of his goods, and the rather unimimportant enumeration of goods appearing on his and his agents' letter paper, were likely to lead to the erroneous notion that he sold Johann Rahtjen's manufacture. Thus the facts of the case lack that subjective factor in regard to Max Holzapfel which would go to show that he was knowingly breaking the law; neither does this subjective factor which section 14, subsection 2, of the law of the 12th May, 1894, contemplates, exist in the case of his two codefendants. The good faith of these is all the more evident in view of the fact that all the advertising and packing material was forwarded them from England ready for use. As regards the defendant Schultz, moreover, the business letters written by him upon sheets provided with the headings above characterized need alone be here considered, and it must be taken into account that no opposition or protest was raised by the managing clerk of the firm of Johann Rahtjen against the use of those sheets *per se*. None of the three defendants, therefore, has been guilty of an offense under section 14, subsection 2, of the imperial law of May 12th, 1894.

What Max Holzapfel and Joost are charged with is an offense alleged to have been committed within the period extending to the end of November, 1896. Since July 1, 1896, the law for the prevention of unfair competition of May 22, 1896, has come into operation, and the question might arise whether the proceedings of the two defendants, in so far as they took place after the 1st of July, 1896, do not come within the purview of the penalties enacted by that law, in which case the provisions contained in section 4, l. c., would alone apply. Now, in the course of this trial, it has not been elicited that any actions of the character described—whether the providing of advertising papers with the name of Rahtjen, or the sale or offer for sale of goods packed with the incriminating packing—have positively been committed after the 1st July, 1896.

588 Of the circumstances summarized in section 4, l. c., as constituting a punishable offense, one at most might be said to exist in the present case—viz., that untrue statements calculated to mislead had been knowingly made by Holzapfel and Joost concerning the origin or source of the goods, and that they had been so made with the intention of making their offer appear as an exceptionally advantageous one. Now it may be an open question—though this may be denied—whether all the facts of this case supply that objective factor which section 4 contemplates. Be that as it may, the defendants must be acquitted on this point also, because it cannot be shown that they have made untrue or misleading statements of fact regarding the source of supply of the goods knowingly. Therefore, the three defendants should be acquitted, the question of costs to be settled pursuant to sections 497 and 499 of the Code of Criminal Procedure.

(Signed) DANZEL.
SCHULTZ.
DR. SCHIEFLER.
IPSEN.
EWALD.

Here is the seal.
This is a true copy.
[Seal of the Court.]

TÜGEL,
Clerk to the Court

UNITED STATES CONSULATE AT HAMBURG, *ss:*

No. 1196.

I, Ernest H. L. Mummenhoff, vice and deputy consul of the United States of America at Hamburg, do hereby certify that the seal of the Hamburg court of judicature, and the signature of Tügel, clerk of the court, to the instrument of writing hereto annexed, are true and genuine, and as such are entitled to full faith and credit.

In testimony whereof, I have hereunto subscribed my name
589 and affixed my seal of office this 29th day of August, A. D. 1899.

[Consulate Seal, U. S.]

H. L. MUMMENHOFF,
Vice and Deputy United States Consul.

Adjourned to Thursday, September 7, 1899, at 11.30 a. m.

7TH SEPTEMBER, 1899.

Met pursuant to adjournment.
Present: Counsel as before.

JOHN PATTINSON, a witness called on behalf of the defendants in surrebuttal, being first duly sworn, testified as follows in answer to questions propounded to him by Mr. McMaster:

Counsel for complainant interposes the same objection to the production and examination of this witness as to the recalling of the witness A. C. A. Holzapfel, and renews the notice of motion heretofore made in reference to the surrebuttal evidence, it being understood that this entire deposition is taken subject to such objections and notice, and that the attendance by counsel for complainant at the taking of the same is no waiver of any of complainant's rights.

1 Q. What is your name, age, residence and occupation?

A. John Pattinson; age, 71; the Side, Newcastle-on-Tyne; my occupation is analytical chemist.

2 Q. How long have you been analytical chemist, and where and what, if any, positions have you held?

A. I have been in practice as an analytical chemist in Newcastle for the last forty years. I am a fellow of the Institute of
590 Chemistry, past vice-president of the Chemical Society of London, and I have been public analyst for Newcastle-on-Tyne for twenty-seven years and county analyst for the county of Northumberland for about twenty years. I am also public analyst for other places, which it is not, perhaps, necessary to specify.

3 Q. Are you acquainted with Mr. A. C. Holzapfel, here present, and how long have you been acquainted with him?

A. Yes, I am acquainted with him, and I have known him at any rate since 1881, and before that I do not know how long.

4 Q. State whether or not, at Mr. A. C. Holzapfel's request, you ever took samples of a composition represented to you to be Rahtjen's patent composition from casks or barrels or drums; and, if so, when first, so far as you can tell me?

Counsel for complainant further objects to this question as incompetent, irrelevant and immaterial, and also as leading.

A. I have taken samples at Mr. Holzapfel's request, and, so far as I can tell, the first was on October the 29th, 1881.

5 Q. Have you any memorandum or original data which would enable you to fix this date?

A. I have my note book used by me at that time and in which I wrote notes of what was done on that occasion.

6 Q. Are these entries in your own handwriting?

A. They are in my own handwriting.

7 Q. And were made at what time?

A. They were made at the time that the samples were taken.

8 Q. Please give the first date?

A. October the 29th, 1881.

591 9 Q. Please read the entry which you find in your note book and which you made at that time regarding this matter.

Same objection.

A. This is what I find in my note book: "Went with Mr. M. Holzapfel and Mr. L. Holzapfel to the warehouse, middle dock, South Shields, and there took samples from 3 casks of 'Rahtjen's patent 'compositions,' marked as follows:" Then I have indicated a circle upon each cask and the marks which were upon one end of the casks:

"at the oposite end of cask 'III,' and 'Stir well before using.' Ob-"serve that the casks had not been previously opened. Tin plate "covering bung-hole undisturbed and painted. Took head off each "cask. Stirred well with a stick and immediately afterwards in-"serted a tube (lead) to middle of paint—keeping finger on end to "prevent the paint entering until the tube was at the middle. Then "allowing the paint to enter. The samples thus drawn were placed "in bottles, and taken away by me. In my possession all the time."

Counsel for defendant submits the entry, which the witness had just read, to complainant's counsel for his inspection and use on cross-examination.

10 Q. Did the word "Rahtjen," or "Rahtjen's composition," or Rahtjen's patent composition" appear on these barrels, casks or drums?

592 A. No; certainly not, or I should have marked them down.

11 Q. From what source did you get the information that the casks contained Rahtjen's patent composition?

A. I have no doubt that Mr. Holzapfel would tell me that it was Rahtjen's patent composition, and I have entered it in my book in inverted commas to indicate that I did not give that name to it, but it was a name given to me.

12 Q. That was no part of the marks on the cask?

A. No; if these words had been at all marked on the casks, I certainly would have made a note of it.

13 Q. Do you find any other similar entries in your note book?

Same objection.

A. I find another entry under date November 16th, 1881.

14 Q. In whose handwriting is that?

A. My own handwriting.

15 Q. And made when?

A. Made at the time.

16 Q. Please read that entry.

A. "November 16th, 1881. Two lots of Rahtjen's patent composition sampled on the London wharf this day.

"(A) marked:

S. H. & Co.
48942
South Shields.

Other end III.

"In the presence of Mr. Holzapfel and Mr. ."

(I have not filled in the name there, but I remember the reason for it: I did not know the gentleman's name at the time; it was a Mr. Schnitger; however, it is not entered in my note book.)

"Casks just as received out of boat. The cask opened selected by "myself."

593 "2nd sample (B) marked:

S. H. & Co.
48944
Jarrow.

Other end III.

"Sampled like those at S. Shields."

The entry which the witness has just read is shown to complainant's counsel for his inspection and use on cross-examination.

17 Q. Did the word "Rahtjen," or "Rahtjen's composition," or "Rahtjen's patent composition," appear anywhere on these casks?

A. No; certainly not, or I should have noted it.

18 Q. And from what source did you get the information that they contained Rahtjen's patent composition?

A. From Mr. Holzapfel.

19 Q. Have you now in your possession any other memorandum containing original entries as to other transactions of a similar character?

A. Yes; I have an entry in my note book of 1883.

20 Q. Is that entry in your own handwriting?

A. It is in my own handwriting.

21 Q. And made at what time?

A. Made at the time.

22 Q. Please read that entry.

A. "March 8th, 1883. Requested by Mr. Holzapfel * to sample a "cask of paint addressed Messrs. Ward & Holzapfel,* Forth Goods "Station, Newcastle. Cask marked 'S. H. & Co.—14,304 South "'Shields' on one end and 'III.' on the other. Taken in the pres- "ence of Fritz Schnitger, who also took a sample at the same time.

"*A. C. Holzapfel, of Ward & Holzapfel, Baltic chambers, Quay- "side."

That is all I have.

594 23 Q. Did the word "Rahtjen," or "Rahtjen's composition," or "Rahtjen's patent composition," appear on that cask?

Same objection, and as leading.

A. Certainly not, or I should have noted it down.

The entry which the witness has just read is now shown to the complainant's counsel for his inspection and use on cross-examination.

24 Q. Do these memorandum books which you have produced and read from, contain other entries than those relating to this Rahtjen's composition?

A. Oh, yes; they are pocket-books used by me during those two years respectively.

25 Q. And you would prefer to keep these books yourself, I presume?

A. Yes.

26 Q. Was there, or not, any label on these casks like the Complainant's Exhibit V, or substantially like that?

Same objection.

A. No; I do not remember seeing this before.

27 Q. If there had been such a label on the casks testified to by you, you would have made an entry or note of it at that time?

A. I have no doubt I would.

28 Q. Would that be your usual practice in such cases?

A. Yes.

29 Q. When you took the samples at the times and in the manner shown in your original entries, did you see other casks of like character standing round?

A. Well, I do not remember just now; but on November 16th I have an entry, "The cask opened selected by myself." I infer from that entry that there must have been other casks.

595 30 Q. Did you on any occasion, see any casks stenciled with the words "Rahtjen's composition," or "Rahtjen's patent composition," or "Rahtjen's anti-fouling composition"?

A. Certainly not on these occasions referred to in that note book, and I do not remember any other occasion on which these words were on.

31 Q. Did you on any occasion see a label like Complainant's Exhibit V on any of these casks?

A. I do not remember one; if there had been, I am certain I would have made a note of it.

I am now willing that these books themselves shall be put in evidence, provided that they are returned to me within twelve months.

Under this consent defendant's counsel now offers the books themselves in evidence, and they are marked Defendant's Exhibit Pattinson Note Books No. 1 and No. 2, respectively.

Objected to as incompetent, irrelevant, and immaterial.

32 Q. Are there other entries regarding analyses where you yourself took the sample of the article to be analyzed in your 1881 note book?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, several, chiefly towards the end of the book. At that part of the book following printed "Memoranda 1881" are entries such as you call for, relating to "Durham gas;" next page, "North Shields gas;" next page, "South Shields gas;" next page, "Gateshead gas;" then, on the page following, "Consett gas;" then four pages referring to the testing of illuminating power of the electric light as installed in Newcastle; then "Testing gas at Stockton" on the last page for notes under date March the 15th, 1881.

596 33 Q. In making these entries were you always careful to make them on the consecutive pages of the book?

Same objection, and, further, as leading.

A. No, on the first page of memoranda, under the date of August the 8th, 1881, there are some notes relating to a visit I paid to a farm at Long Benton, and the taking of samples of water there for analysis; then follow the entries relating to the sampling of Rahtjen's composition.

34 Q. Now, referring to this entry, I notice on the top line the words "Mr. M. Holzapfel and Mr. L. Holzapfel" written apparently over a rubber erasure; what can you tell me about that?

Same objection.

A. I do not remember anything about that. It was written cer-

tainly at or about the time. I had no idea that I had any entries at all until I looked at it a few weeks ago, when I was consulted about this matter.

35 Q. Are those words in your own handwriting?

A. Yes.

36 Q. And, according to your best recollection, they were written on that date—October the 29th, 1881?

A. Or about that date. It might be that I did not know the Christian names of the Messrs. Holzapfel, and got these names from some one shortly after, but I can safely say, for the last eighteen years at any rate, I have not made the slightest alteration in these entries.

37 Q. In whose custody have these books been up to the time you produced them this morning?

A. My own.

38 Q. From the time the entries were made up to the present day?

A. Yes, certainly.

39 Q. Now look at your note book of 1883 and see what
597 entries you find therein regarding the taking of samples for analyses other than this composition about which you have been examined.

A. There is a private entry about people applying for situations in my place; that is the first page. Then under February the 15th, 1883, I have an entry relating to the sampling of some coke at the Eldon colliery near Bishop Auckland. On the next page I have a note relating to some dynamite cartridges. Then follows the entry with regard to the sampling of the paint for Mr. Holzapfel at the Forth Goods station. Following that there is an entry of taking some samples of water near a paper works at Lintz Green. Then further on some arrangement with regard to a patent, and further on again further entries with regard to taking samples of water at Lintz Green. That fills up the whole of the first part. The middle part is a sort of cash book and for memoranda of various kind, and then at the end of that follow some notes relating to the taking of samples of water and sewage in Jesmond Dean. Then follow entries of testing gas at Durham, North Shields and South Shields and Redheugh. Then some memoranda relating to the taking of some sewage outfalls at Benton, and some memoranda of a visit at Mr. Hammond's works in Bermondsey street, London. Those are all that relate to taking samples.

40 Q. In those days; that is, in the years 1881 to 1883 inclusive, which was the commonest way regarding analyses which you made; that you took the samples yourself, or that the samples were given to you to be analysed?

Same objection.

A. They were usually given to me. It is not often I took the samples personally. Very often the samples are brought to my laboratory.

Cross-examination by Mr. MERWIN, subject, however, to the
598 objections to the admissibility of the deposition in surrebuttal and all other objections heretofore entered, and without the waiving of any rights in respect of the same:

41 X Q. Have you been employed by Mr. Holzapfel since 1883 to do any work for him?

Objected to as incompetent, immaterial and irrelevant, and not proper cross-examination.

A. I think so.

42 X Q. Do you not know?

Same objection.

A. Yes, I have, by Mr. Holzapfel or his firm.

43 X Q. When were you first spoken to about testifying in this case?

A. I think it is about a fortnight or three weeks ago.

44 X Q. As your testimony with reference to the markings of the packages has consisted of reading the entries which you made in your note books in reference to the same, it is by means of these entries that you recall the fact of having made analyses and of the circumstances respecting the same, is it not?

A. Yes.

45 X Q. You have no other means of memory of the details of the transaction excepting those entries?

A. I remember taking the samples, but I have no remembrance exactly of what were upon the casks apart from my entries in the note books.

46 X Q. Are you sure that you recorded in your memoranda all of the marks upon those casks?

A. Yes; I am quite sure.

47 X Q. What makes you sure of that fact?

A. Because on one occasion I have entered, I see such a thing as "Stir well before using," which I should regard as a direction. I have entered that in my note book, but I did not enter it in my certificate, as not being of sufficient importance. I regarded
599 that simply as a direction for use, and not as a mark upon the cask in any way.

48 X Q. Do you know whether there were screws, nails, or tacks driven into any of these casks?

A. I do not remember.

49 X Q. That would be something which you could not recall?

A. No; I should think not.

50 X Q. It would not be such a mark that you would enter it as part of your record of the analysis?

A. No; certainly not.

51 X Q. In you first entry in your record of October 29th, 1881, the words "Rahtjen's patent composition" is in quotation marks; what does that mean?

A. It means that I have been told it was Rahtjen's patent composition—that I had to sample Rahtjen's patent composition.

52 X Q. If it were not in quotation marks, it would have indicated that it was upon the casks?

A. No; I think not. I would have included that if it had been in the marks upon the cask.

53 X Q. What would it have meant here if you had not put the quotation marks down?

A. It would simply mean that I had been instructed to sample Rahtjen's patent composition. I would not assume the responsibility of its being Rahtjen's patent composition by calling it so unless I had been so instructed.

54 X Q. Then the quotation marks have no significance at all, have they?

A. It does not mean, at any rate, that it was a mark on the cask. It has no further significance than some one has told me that it was Rahtjen's patent composition.

55 X Q. Then it would mean the same without the quotation marks, would it not?

A. It really has not very much significance.

56 X Q. In your entry of March the 8th, 1883, you have in
600 quotation marks III. Does that indicate there were no other marks upon the end of the barrel than that?

A. I do not know. There might have been. It is quite likely. I think there might have been "Stir well before using," but, regarding that as a direction, it is hardly likely that I would copy that. I am rather surprised to find that that has been copied at all. The intention was merely to take the numbers and the marks upon the casks.

57 X Q. In other words, what you sought to do was to give the prominent identifying marks of the packages, and not absolutely every mark upon them, if those other marks appear to have been immaterial?

A. I seem to have given every mark. I am quite certain, if "Rahtjen's patent composition" had been marked on the casks in any way, I should have taken note of it.

58 X Q. But such a marking as directions for use you would not regard as of sufficient importance?

A. No.

59 X Q. So, in whatever form that might have been on the cask, you might have very properly omitted the copying of it?

A. Yes.

59*a* X Q. How do you know that that entry of March the 8th, 1883, was for analysis of Rahtjen's composition?

A. I would have been told so at the time.

60 X Q. How do you know you were told so at the time?

A. I do not know.

61 X Q. How can you testify now that this entry refers to an entry of Rahtjen's composition?

A. I am thinking how the certificate was made out. I think, if I remember aright, the certificate was made out as a sample of Rahtjen's patent composition; if so, I would be told it was Rahtjen's patent composition.

601 62 X Q. The certificate, if any, is not in evidence; the only thing in evidence is your memoranda book and your statements in reference thereto. The entry of March the 8th, 1883, does not anywhere bear "Rahtjen" or "Rahtjen's composition"?

A. No.

62*a* X Q. Are you now ready to swear that this entry is an analysis of Rahtjen's composition as long as those names do not appear upon the record?

A. I compared that entry with the certificate I issued at the time, and the entry in the laboratory note book, and there it is entered as "Rahtjen's patent composition."

63 X Q. Then you had been told that this entry was of an analysis of Rahtjen's composition, and you have referred to other papers or memoranda aside from this book?

A. Yes.

64 X Q. There is nothing, however, in the memoranda book which has been placed in evidence with reference to the analysis of 1883 to show that it refers to Rahtjen's composition, is there?

A. Not in the note book.

65 X Q. Referring particularly to the package which you had opened in 1883, in what condition were the marks upon that package—fresh or weather-worn, or otherwise?

A. I cannot possibly remember.

66 X Q. The substance of it, then, is that, as to these markings upon the package, you have to rely solely upon the record you made in your memoranda book in the ordinary course of business?

A. Yes, and with reference to the certificate I have just told you about.

67 X Q. You have already stated, if I understood you rightly, that the certificate did not bear as much of the markings as your memoranda book?

A. In one respect it did not bear the directions for being stirred before using.

602 68 X Q. How many casks or barrels were there in the lot from which you took the samples on either of these occasions?

A. I do not remember.

69 X Q. Do you know whether there were any others of your own knowledge?

A. Well, I gave you an instance why I inferred there were others from a note which I had in the book.

70 X Q. I ask you have you any definite recollection as to whether there were any other packages of a like character from which you took these, excepting this entry in your memoranda book?

A. No; I have no note of the number of casks the samples were taken from.

71 X Q. Of course you have not had your attention called to this transaction, I presume, since the time of its occurring, and the time when you were asked to testify in this case?

A. No; I think not, unless my notes were included in an action which was tried at Newcastle in 1883.

72 X Q. Were any of these analyses or examinations made by you with reference to that suit?

A. I think so.

73 X Q. Did you testify in that suit?

A. Yes.

74 X Q. Have you testified for Mr. Holzapfel in any other suit than that?

A. I think not.

75 X Q. Do you remember in detail the circumstances and the manner in which you opened the casks for taking the samples on October 29, 1881?

A. Yes; they are stated here (referring to the memoranda book of 1881). I do not remember them apart from that. I do remember getting a piece of lead pipe; I remember that.

76 X Q. Which head of the cask did you take out?

A. I do not remember.

77 X Q. Who took it out, you or some workman for *for* you?

A. That I do not remember.

603 78 X Q. How did these casks stand or lie when they were delivered to you—or were you brought to them?

A. I was brought to them.

79 X Q. How did the casks stand or lie?

A. I do not know.

80 X Q. You do not know, then, whether they stood on end or lay upon their sides?

A. No.

81 X Q. You do not know how they were opened?

A. There is a reference there to a piece of tin plate, "Tin plate covering bung-hole undisturbed and painted." I can only infer how it was done, but I think this piece of tin plate would be taken off; you would get to the bung-hole and stir it up from the bung-hole.

82 X Q. Where was the bung-hole, in the head or side of the cask?

A. I do not remember.

83 X Q. What was the color of these casks?

A. That I do not remember.

84 X Q. What was the color of the markings?

A. It is nearly nineteen years ago, and I do not remember the color of the markings.

85 X Q. Your purpose at the time of making these examinations and analyses was to get at the character of the contents and not to notice particularly and in detail all of the markings upon the exterior of the cask further than the usual prominent identification marks, was it?

A. It was chiefly to get at the contents of the vessel; of course, the important part of that was to notice all the marks which were upon it.

86 X Q. But the noticing of the marks was a part of your ordinary course of work?

A. Yes.

87 X Q. So as to identify the packages merely, was it not?

604 A. Yes, to identify the packages, certainly; but if "Rahtjen's patent composition" had been painted on in any way

or been a constituent part of the marks I am quite certain that would have been put in my notes.

88 X Q. You have had no occasion other than in making these examinations for Mr. Holzapfel to notice how packages containing compositions for ships' bottoms were particularly marked at other times and places?

A. I do not remember any at present.

89 X Q. Your duties, being of a professional character, and having nothing to do with other lines of work, of necessity that would be the case?

A. Yes.

90 X Q. How do you now know that any of the casks which you examined on these different occasions could not have been previously opened and closed?

A. Well, there is one instance noted down here. "Observed that the casks had not been previously open. Tin plate covering bung-hole undisturbed and painted. Took head off each cask and stirred well with a stick." So that describes exactly how it was done. It was not taken out of the bung-hole. That is the entry *in* October 29, 1881. That is the only instance which I have noted down regarding the proceeding. I see here, under November 16th, 1881: "Casks just as received out of boat. The cask opened selected by myself." I would be present, I think, when these casks were taken out of the boat or else I would not have said that. That certainly would be some evidence that they were just as received out of the boat; and I infer from the fact of my saying the cask opened was selected by myself that there were other casks besides this opened.

91 X Q. As to these facts you have no memory outside those entries?

A. No; but that is quite definite on the point. I should trust these rather than my memory at this distance of time.

605 92 X Q. You speak in one of these entries of cask or package as received from the boat. On the other occasions when you made examinations where were the packages which you examined? In the *the* possession of Mr. Holzapfel or elsewhere?

A. The one in the Forth Goods station would be in the possession of the railway company at that time. I do not know in whose warehouse those at the middle dock, South Shields were—I do not know in whose possession they were.

93 X Q. Do you know whose property the casks in these cases were?

A. I do not know.

94 X Q. What was the reason Mr. Holzapfel gave you for asking you to make these analyses?

A. That I do not remember; it is quite possible he might give me no reason at all. Clients very often act in that way.

95 X Q. You never made any memoranda of the markings upon any other casks other than these which you examined, did you?

A. That is quite possible.

96 X Q. Do you know that you did; I mean by "other casks" upon casks of Rahtjen's composition?

A. I think about 1889 there were samples taken, but I did not take it; it was sent to me.

97 X Q. By whom?

A. By Mr. Holzapfel.

98 X Q. For what purpose?

A. For analysis.

99 X Q. How many times have you been employed by Mr. Holzapfel professionally since 1883?

A. I do not remember; I should think possibly twenty or thirty times.

100 X Q. I suppose you were his consulting or advising chemist in his business?

A. Yes, analytically more than anything.

606 Redirect examination by Mr. McMASTER:

101 Re-D. Q. You have no pecuniary interest in, and are not connected in business with, Holzapfel & Company or with the Holzapfel Composition Company?

A. Not the slightest.

102 Re-D. Q. And you have no pecuniary interest in this suit or in the result thereof?

A. None whatever.

JOHN PATTINSON.

Sworn to before me, etc.

ALEXANDER RIDGWAY,
Notary Public.

Mr. A. C. HOLZAPFEL recalled and further examined by Mr. McMASTER:

Same objection as heretofore, to the second recalling of this witness, and the same notice with reference to the attendance of complainant's counsel upon his deposition, and the motion to strike out the same.

1 Q. You have heard the testimony given by Mr. Pattinson, the last witness, have you not?

A. Yes.

2 Q. State, if you know, how these barrels or casks, referred to in Mr. Pattinson's deposition, were received, and from whom, and whether or not in the usual course of business.

Same objection as above to this entire examination.

A. I have no direct memory of the facts, and can only speak from Mr. Pattinson's notes. From these, I find that the first parcel, which he examined on the 29th of October, 1881, was at a ware-
607 house in the middle dock. The second parcel of the 16th of November was at the London wharf, where the composition arrived by steamer, which I received from Suter, Hartmann & Company, London, and which was sent from the works of Hartmann Brothers in London, and which was received by me in the ordinary

course of business. The third sample which was taken refers to an examination of Rahtjen's composition, which my firm of Ward & Holzapfel in 1883, bought through a firm of ship-owners, friendly to us, and who obtained it from Suter, Hartmann & Company. It was bought with a view of ascertaining whether the analysis at that time was the same as it had been in 1881.

3 Q. State whether it was bought in the ordinary course of business by the ship-owner.

A. Those friends of my firm of Ward & Holzapfel bought the casks in the usual course of business.

A. C. HOLZAPFEL.

Sworn to before me, etc.
ALEXANDER RIDGWAY,
Notary Public.

608 APPENDIX.

DEFENDANT'S EXHIBIT CERTIFIED COPY OF ENGLISH PATENT TO HEINRICH RAHTJEN 3290 OF 1873.

(Coat of arms.)

A. D. 1873, 29th November. No. 3920.

Preservative Composition for Ships' Bottoms, &c.

Letters patent to Heinrich Rahtjen, of Bremerhaven, Germany, and temporarily of Basinghall street, in the city of London, for the invention of "An improved anti-fouling and preservative composition for ships' bottoms and other submerged structures."

Sealed the 20th January, 1874, and da[illegible] the 29th November, 1873.

Provisional Specification Left by the said Heinrich Rahtjen at the Office of the Commissioners of Patents, with His Petition, on the 29th November, 1873.

I, Heinrich Rahtjen, of Bremerhaven, Germany, and temporarily of Basinghall street, in the city of London, do hereby declare the nature of the said invention for "An improved anti-fouling and preservative composition for ships' bottoms and other submerged structures," to be as follows:

This invention relates to an improved composition for preserving and preventing the fouling of iron ships' bottoms as well as other submerged iron structures.

The following are the ingredients of this improved composition, namely:

609 No. 1. Alcohol, wood nap-tha, or methylated spirit.
No. 2. Shellac.
No. 3. Thick turpentine.

No. 4. Linseed oil.
No. 5. Common rosin.
No. 6. Galipot.
No. 7. Tar spirit.
No. 8. Tallow.
No. 9. Venetian red.
No. 10. Arsenic.
No. 11. Oxide of zinc.
No. 12. Oxide of mercury.

These ingredients are incorporated together in the following manner: I first dissolve No. 2 in No. 1, I then take Nos. 3, 4, 5, 6, 7, 8, and heat them together, and when in a cold state I mix with them the solution of shellac. Lastly, I mix Nos. 9, 10, 11, and 12, in a dry state with the foregoing and incorporate the whole well together by stirring, and after standing a day or two the composition is fit for use.

Specification in Pursuance of the Conditions of the Letters Patent Filed by the said Heinrich Rahtjen in the Great Seal Patent Office on the 18th May, 1874.

To all to whom these presents shall come, I, Heinrich Rahtjen, of Bremerhaven, Germany, and temporarily of Basinghall street, in the city of London, send greeting:

Whereas Her Most Excellent Majesty Queen Victoria, by her letters patent, bearing date the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and seventy-three, in the thirty-seventh year of her reign, did, for herself, her heirs and successors, give and grant unto me, the said Heinrich Rahtjen, her special licence that I, the said Heinrich Rahtjen, my executors, administrators, and assigns, or such others as I, the said Heinrich Rahtjen, my executors, administrators, and assigns, should at
610 any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might, make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel islands, and isle of Man, an invention for "an improved anti-fouling and preservative composition for ships' bottoms and other submerged structures," upon the condition (amongst others) that I, the said Heinrich Rahtjen, my executors or administrators, by an instrument in writing under my, or their, or one of their hands and seals, should particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and cause the same to be filed in the Great Seal patent office within six calendar months next and immediately after the date of the said letters patent.

Now, know ye, that I, the said Heinrich Rahtjen, do hereby declare the nature of the said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement, that is to say:

This invention relates to an improved anti-fouling and preserva-

tive composition to be applied to the bottoms of iron ships and other submerged iron structures.

The composition consists of the ingredients hereafter named. The proportions annexed thereto are calculated by weight and are those which I find to answer best in practice, although I do not confine myself to the precise proportions given, as it will be understood that the same may be varied without departing from my invention.

611

	No. 1. Alcohol, wood nap-tha, or methylated spirit	120	parts.
No.	2. Shellac	42	"
No.	3. Thick turpentine	8	"
No.	4. Linseed oil (boiled)	20	"
No.	5. Common rosin	15	"
No.	6. Galipot	10	"
No.	7. Tar spirit (otherwise called tar oil)	6	"
No.	8. Tallow	6	"
No.	9. Venetian red	120	"
No.	10. Arsenic	20	"
No.	11. Oxide of zinc	3	"
No.	12. Oxide of mercury	30	"
	Total	400	

These ingredients are incorporated together in the following manner: I first dissolve the ingredients indicated above by Nos. 2 and 3 in ingredient No. 1. I then melt together over a moderate fire ingredients Nos. 5, 6, and 8, and afterwards allow the same to cool somewhat until only warm enough to maintain its fluidity, and then mix therewith ingredients Nos. 4 and 7. I then take the first solution of ingredients Nos. 1, 2, and 3, and add it to the above mixture of ingredients Nos. 4, 5, 6, 7, 8, and stir the whole well together until thoroughly mixed, and I then add thereto the ingredients Nos. 9, 10, 11, 12, either separately or together, and mix well together until thoroughly commingled and no sediment is found. The composition will then be fit for use.

Having described the nature of the invention and the manner of performing the same, I declare that what I claim as the invention to be protected by the hereinbefore in part recited letters patent is, the anti-fouling and preservative composition consisting of the ingredients and prepared in the manner substantially as herein specified.

612 In witness whereof, I, the said Heinrich Rahtjen, have hereunto set my hand and seal, this sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

HEINRICH RAHTJEN. [L. S.]

1873. No. 3920.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to all to whom these presents shall come, Greeting:

Whereas Heinrich Rahtjen of Bremerhaven, Germany and temporarily of Basinghall street in the city of London hath by his petition humbly represented unto us that he is in possession of an invention for an improved anti-fouling and preservative composition for ships' bottoms and other submerged structures which the petitioner believes will be of great public utility that he is the first and true inventor thereof and that the same is not in use by any other person or persons to the best of his knowledge and belief The petitioner therefore most humbly prayed that we would be graciously pleased to grant unto him his executors administrators and assigns our royal letters patent for the sole use benefit and advantage of the said invention within our United Kingdom of Great Britain and Ireland the Channel islands and isle of Man for the term of fourteen years pursuant to the statute in that case made and provided And we being willing to give encouragement to all arts and inventions which may be for the public good are graciously pleased to condescend to the petitioner's request Know ye therefore that we of our especial grace certain knowledge and mere motion have given and granted and by these presents for us our heirs and successors do give and grant unto the said Heinrich Rahtjen his executors
613 administrators and assigns our especial license full power sole privilege and authority that he the said Heinrich Rahtjen his executors administrators and assigns and every of them by himself and themselves or by his and their deputy or deputies servants or agents or such others as he the said Heinrich Rahtjen his executors administrators or assigns shall at any time agree with and no others from time to time and at all times hereafter during the term of years herein expressed shall and lawfully may make use exercise and vend his said invention within our United Kingdom of Great Britain and Ireland the Channel islands and isle of Man in such manner as to him the said Heinrich Rahtjen his executors administrators and assigns or any of them shall in his or their discretion seem meet And that he the said Heinrich Rahtjen his executors administrators and assigns shall and lawfully may have and enjoy the whole profit benefit commodity and advantage from time to time coming growing accruing and arising by reason of the said invention for and during the term of years herein mentioned to have hold exercise and enjoy the said licenses powers privileges and advantages hereinbefore granted or mentioned to be granted unto the said Heinrich Rahtjen his executors administrators and assigns for and during and unto the full end and term of fourteen years from the day of the date of these presents next and immediately ensuing according to the statute in such case made and provided And to the end that he the said Heinrich Rahtjen his executors administrators and assigns and every of them may have and enjoy the full benefit and the sole use and exercise of the said invention according to our

gracious intention hereinbefore declared We do by these presents for us our heirs and successors require and strictly command all and every person and persons bodies politic and corporate and all other our subjects whatsoever of what estate quality degree name or condition soever they be within our United Kingdom of Great Britain and Ireland the Channel islands and isle of Man that neither they nor any of them at
614 any time during the continuance of the said term of fourteen years hereby granted either directly or indirectly do make use or put in practice the said invention or any part of the same so attained unto by the said Heinrich Rahtjen as aforesaid nor in anywise counterfeit imitate or resemble the same nor shall make or cause to be made any addition thereunto or subtraction from the same whereby to pretend himself or themselves the inventor or inventors devisor or devisors thereof without the consent license or agreement of the said Heinrich Rahtjen his executors administrators or assigns in writing under his or their hands and seals first had and obtained in that behalf upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command And further to be answerable to the said Heinrich Rahtjen his executors administrators and assigns according to law for his and their damages thereby occasioned And moreover we do by these presents for us our heirs and successors will and command all and singular the justices of the peace mayors sheriffs bailiffs constables head boroughs and all other officers and ministers whatsoever of us our heirs and successors for the time being that they or any of them do not nor shall at any time during the said term hereby granted in anywise molest trouble or hinder the said Heinrich Rahtjen his executors administrators or assigns or any of them or his or their deputies servants or agents in or about the due and lawful use or exercise of the aforesaid invention or anything relating thereto Provided always and these our letters patent are and shall be upon this condition that if at any time during the said term hereby granted it shall be made to appear to us our heirs or successors or any six or more of our or their privy council that this our grant is contrary to law or prejudicial or inconvenient to our subjects in general or that the said invention is not a new invention as to the public use and exercise thereof within our United Kingdom of Great
615 Britain and Ireland the Channel islands and Isle of Man or that the said Heinrich Rahtjen is not the first and true inventor thereof within this realm as aforesaid these our letters patent shall forthwith cease determine and be utterly void to all intents and purposes anything hereinbefore contained to the contrary thereof in anywise notwithstanding Provided also that these our letters patent or anything herein contained shall not extend or be construed to extend to give privilege unto the said Heinrich Rahtjen his executors administrators or assigns or any of them to use or imitate any invention or work whatsoever which hath heretofore been found out or invented by any other of our subjects whatsoever and publicly used or exercised within our United Kingdom of Great Britain and Ireland the Channel islands or Isle of Man unto whom our like let-

ters patent or privileges have been already granted for the sole use exercise and benefit thereof It being our will and pleasure that the said Heinrich Rahtjen his executors administrators and assigns and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid shall distinctly use and practice their several inventions by them invented and found out according to the true intent and meaning of the same respective letters patent and of these presents Provided likewise nevertheless and these our letters patent are upon this express condition that if the said Heinrich Rahtjen his executors or administrators shall not particularly describe and ascertain the nature of the said invention and in what manner the same is to be performed by an instrument in writing or in print under his or their or one of their hands and seals and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of these our letters patent And also if the said Heinrich Rahtjen his executors administrators or assigns shall not pay the stamp duty of fifty pounds and produce these our letters patent stamped with a proper stamp to that amount at the
616 office of our commissioners of patents for inventions before the expiration of three years from the date of these our letters patent pursuant to the provisions of the act of the sixteenth year of our reign chapter 5 and also if the said Heinrich Rahtjen his executors administrators or assigns shall not pay the stamp duty of one hundred pounds and produce these our letters patent stamped with a proper stamp to that amount at the said office of our said commissioners before the expiration of seven years from the date of these our letters patent pursuant also to the said act and also if the said Heinrich Rahtjen his executors administrators or assigns shall not supply or cause to be supplied for our service all such articles of the said invention as he or they shall be required to supply by the officers or commissioners administering the department of our service for the use of which the same shall be required in such manner at such times and at and upon such reasonable prices and terms as shall be settled for that purpose by the said officers or commissioners requiring the same that then and in any of the said cases these our letters patent and all liberties and advantages whatsoever hereby granted shall utterly cease determine and become void anything hereinbefore contained to the contrary thereof in anywise notwithstanding provided that nothing herein contained shall prevent the granting of licenses in such manner and for such considerations as they may by law be granted and lastly we do by these presents for us our heirs and successors grant unto the said Heinrich Rahtjen his executors administrators and assigns that these our letters patent or the filing therof shall be in and by all things good firm valid sufficient and effectual in the law according to the true intent and meaning thereof and shall be taken construed and adjudged in the most favorable and beneficial sense for the best advantage of the said Heinrich Rahtjen his executors administrators and assigns as
well in all our courts of record as elsewhere and by all and
617 singular the officers and ministers whatsoever of us our heirs and successors in our United Kingdom of Great Britain and

Ireland the Channel islands and Isle of Man and amongst all and every the subjects of us our heirs and successors whatsoever and wheresoever notwithstanding the not full and certain describing the nature or quality of the said invention or of the materials thereunto conducing and belonging In witness whereof we have caused these our letters to be made patent this twenty-ninth day of November one thousand eight hundred and seventy-three in the thirty-seventh year of our reign and to be sealed as of the said twenty-ninth day of November one thousand eight hundred and seventy-three. By warrant.

I certify this to be a true copy

[Seal of Patent Office.]

C. N. DALTON, *Comptroller.*

[Revenue stamp.] J. T. T.

Extract from the Register of Patents.

Patent dated 29th November 1873. No 3920.

Petition, declaration, and provisional specification of Heinrich Rahtjen, of Bremerhaven, Germany, and temporarily of Basinghall street, in the city of London, for grant of letters patent for an invention for an improved anti-fouling and preservative composition for ships' bottoms and other submerged structures.

Sealed with the commissioner's seal and referred to solicitor general.

3rd December Petition declaration and provisional specification left with solicitor general for allowance.

8th December Certificate of solicitor general allowing provisional protection received and filed and certificate thereof given.

10th December Notice to proceed received and filed and certificate thereof given.

12th December Provisional protection advertised in Gazette.

16th December Notice to proceed advertised in Gazette

618 8th January 1874 Petition declaration and provisional specification again referred to solicitor general

9th January Fiat for warrant received

14th January Warrant left with solicitor general for signature

17th January Warrant received sealed and filed

20th January Letters patent prepared sealed and dated the 29th November 1873

9th February Specification amended by leave of solicitor general

19th February Assignment—Rahtjen to Rahtjen.—Book P 3, pa. 60

18th May Specification filed in pursuance of letters patent

16th November 1876 Letters patent stamped with £50 stamp produced at office of commissioners of patents and certificate thereof endorsed thereon.

29th November 1880 Letters patent expired.
I certify this to be a true copy
[Seal of Patent Office.]

C. N. DALTON,
Comptroller.
J. T. T.

[Revenue stamp.]

619 DEFENDANT'S EXHIBIT SUTER, HARTMANN & CO.'S INVOICES OF 1877, 1878, & 1879.

18 BILLITER STREET,
LONDON, E. C., *June* 2*nd*, 1877.

Messrs. Hartmann & Co., Newcastle, bo't of Suter, Hartmann & Co.

No short measure or allowances made unless seen and agreed to.
Terms, as usual.
Conveyance, L. & N. W. R'y.

Rahtjen's patent composition.

S. H. & Co. 5889–90	Two casks No. I gr. 4.3.19 tr. 0.3.19 net 4 cwt. @ 88/.....	17.12."
5891–8	Eight kegs No. III^{a} gr. 9.3.27 tr. 1.3.27 net. 8 cwt. @ 134/6.....	53.16."
		71. 8."
	15 %.....	10.14. 2
		60.13.10
	2 casks 10/-8 kegs 32/.....	2. 2."
		£62.15.10

620

18 BILLITER STREET,
LONDON, E. C., *July* 16, 1878.

Messrs. A. C. Holzapfel & Co., Newcastle, bo't of Suter, Hartmann & Co.

No short measure or allowances made unless seen and agreed to.
Terms, as usual.
Conveyance, L. & N. W. R'y.

Rahtjen's patent composition.

S. H. & Co. 13610–3	Four casks No I gr. 9.2.25. tr. 1.2.25 nett 8 cwt. @ 88/.....	35. 4."
13614–9	Six kegs No. III gr. 7.2.2 tr. 1.2.2 nett 6 cwt. @ 139/6.....	41.17."
		77. 1."
	15 %.....	11.11. 2
		65. 9.10
	4 casks 20/-6 kegs 24/.....	2. 4.
		£67.13.10

18 Billiter Street,
London, E. C., *March 20th*, 1879.

Mr. A. C. Holzapfel, Newcastle, bo't of Suter, Hartmann & Co.

No short measure or allowances made unless seen and agreed to.
Terms, as usual.
Conveyance, G. N. R'y.

Rahtjen's patent composition.

S. H. & Co. 22585–9	Five casks No. I gr. 12.1.0 tr. 2.1.0 nett 10 cwt. @ 88/	44."
	15 %	6.12."
		37. 8."
	5 casks @ 5/	1. 5."
		£38.13."

621 Defendant's Exhibit Advice Notes of 1878 & 1879 of John Rahtjen.

Bank Hall Lane, Liverpool, 15" *July*, 1878.

Dear Sir: Please to receive weights of 4 casks & 6 kegs patent composition, sent today to South Shields by L. & N. W. R'y as ordered.

Yours respectfully, JOHN RAHTJEN.

A. C. Holzapfel, Esq., Newc.

S. H. & Co.

13,610–3. 4 casks I.

13,610	2.	1.	24	T 0	1.	24	
1	2.	1.	13	.	1.	13	
2	2.	1.	24	.	1.	24	
3	2.	1.	20	.	1.	20	
Gr.	9.	2.	25	T 1.	2.	25	= 8 cwt.

13,614–9. 6 kegs III.

13,614	1.	0.	27	T 0.	0.	27	
5	1.	1.	2	.	1.	2	
6	1.	1.	1	.	1.	1	
7	1.	1.	0	.	1.	0	
8	1.	1.	0	.	1.	0	
9	1.	1.	0	.	1.	0	
Gr.	7.	2.	2.	T 1.	2.	2.	6 cwt.

21ST M'CH, 1879.

DEAR SIRS: Please to receive weights of 7 casks & 4 kegs patent composition sent today to Newcastle by Gr. N. R'y as ordered.

Yours respectfully, JOHN RAHTJEN.

A. C. Holzapfel.

622 S. H. & Co.

22,685–9. 5 casks I.

22,685	2.	1.	20.	T.	0.	1.	20
6	2.	1.	27		.	1.	27
7	2.	1.	20		.	1.	20
8	2.	1.	23		.	1.	23
9	2.	1.	22		.	1.	22
Gr.	12.	1.	0	T	2.	1.	0 = 10 cwt.

22,690–1. 2 casks II.

22,690	2.	2.	2.	T.	0.	2.	2
1	2.	1.	24		.	1.	24
Gr.	4.	3.	26	T.		3.	26 = 4 cwt.

22,692–5. 4 kegs III.

22,692	1.	1.	5	T.	0.	1.	5
3	1.	1.	4		.	1.	4
4	1.	1.	6		.	1.	6
5	1.	1.	5		.	1.	5
Gr	5.	0.	20.	T.	1.	0.	20 = 4 cwt.

DEFENDANT'S EXHIBIT LETTER-HEAD, SUTER HARTMAN & CO., OF 1878.

Rahtjen's patent composition for ships' bottoms.

(Picture of Great Eastern.)

Suter, Hartmann & Co.

London, Liverpool, & Glasgow.

18 Billiter street, E. C., London, 28 Aug., 1878.

623 DEFENDANT'S EXHIBIT LETTER-HEAD, HARTMANN LE DOUX & CO., OF 1881.

Rahtjen's patent composition for ships' bottoms.

(Picture of Great Eastern.)

Hartmann Le Doux & Co.

London, Liverpool, & Glasgow.

12 Rumford place, Liverpool, 25 M'ch, 1881.

DEFENDANT'S EXHIBIT CERTIFIED COPY OF THE RECORD OF THE APPLICATION, OPPOSITION, AND WITHDRAWAL OF JOHN RAHTJEN, No. 32951 OF 1883.

Office copy 32951.

Trade-marks registration acts 1875-'77.

Form A.

*Application for Registration.**

Name of applicant, in full: Joh. Rahtjen.
Trading style, if any: † ——
624 Address: Bremerhaven and Hamburg, both in the German Empire.
Calling: manufacturers.
Length of user of trade-mark before 13th August, 1875, if any: Nineteen years and upwards.

A separate form must be filled up for each mark claimed.

* This must be accompanied by two additional representations of the mark, each one upon a separate sheet of paper of the same size as this.

In the case of a cotton mark, in class 23, 24, or 25, four additional representations are required for each such class.

One representation of the trade-mark to be affixed within this square.

Any representation of a larger size may be folded, but must then be mounted on linen and affixed hereto.

An agent will sign the applicant's name "By so and so, agent."

If this space be not sufficient for the enumeration of goods, continue on the other side.

Should the mark be claimed in more than one class, the goods should be set out separately for each class.

† In the case of an application on behalf of a firm or of a company, the firm name or the name of the company only should be given here.

RAHTJEN'S COMPOSITION.

Signature of applicant* or agent: Joh. Rahtjen, by Alfred G. Brookes, 59 Chancery lane, London, agent.

Date: The 7' day of July, 1883.

Description of goods for which the trade-mark is required to be registered: In class 1. Anti-fouling compositions, anti-corrosive compositions, compositions, varnishes and paints for ships' bottoms and other surfaces requiring protection or preservation.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

625

Office copy.

Opp. 590.

Trade-marks registration act 1875.

In the matter of an application, No. 32951, by John Rahtjen, of Bremerhaven and Hamburg, in the German Empire, manufacturer.

To the registrar of trade-marks:

We Messrs. M. Holzapfel & Co. of 41 Quayside Newcastle-upon-Tyne merchants and manufacturers hereby give notice that we oppose the registration of the trade-mark advertised under the above number for class 1 in the Trade-marks Journal of the 15th day of August 1883 No. 288 page 472

The grounds of opposition are as follows

1. The right to use the said mark never belonged nor does it belong to the applicant

2. The said mark has never been nor is it used by the said applicant or any predecessor in title as a trade-mark

3. The said mark is not nor ever has been an old mark and has never been used prior to the 13th day of August 1875 by the said

* Unless the application be signed by an agent: In the case of a firm, the firm name should be signed by one partner "By so and so, a member of the firm;" in the case of a company, the secretary or other principal officer should sign, as such, for the company.

applicant or any predecessor in title for the purpose of distinguishing in any market any goods manufactured by him

4. The said mark is not such a- exclusive device or form of words which would constitute a mark by which the said goods could be known in any market

And divers other good grounds of opposition

Dated the 7th day of November 1883

BROWNLOW & HOWE,
11 *New Court, Lincoln's Inn, W. C., Solicitors,*
Agents for M. Holzapfel & Co.

626 I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

Patents, designs, and trade-marks acts 1883 to 1888.

In the matter of the application No. 32951.

I, Cornelius Neale Dalton, comptroller general of patents, designs, and trade-marks, hereby certify that an application was on the 7th July, 1883, made at this office for the registration of a trade-mark, a representation of which is shown hereunder, in class 1, in respect to anti-fouling compositions, anti-corrosive compositions, compositions, varnishes, and paints for ships' bottoms and other surfaces requiring protection or preservation, in the name of Joh. Rahtjen, of Bremerhaven and Hamburg, both in the German Empire, manufacturers, and to it the official number 32951 was given. I further certify that this application was opposed after advertisement, and no counter statement being furnished by the applicants, was deemed to be withdrawn.

Such application stated that the said trade-mark had been used for nineteen years and upwards before the 13th August, 1875.

Witness my hand and seal this 25th day of November, 1898.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller General.

Rahtjen's composition.

The patent office: Trade-marks branch, 25 Southampton buildings, London.

627 DEFENDANT'S EXHIBIT CERTIFIED COPY OF THE RECORD OF THE APPLICATION, OPPOSITION, AND WITHDRAWAL OF JOHN RAHTJEN, No. 32826 OF 1883.

Office copy. 32826.

Trade-marks registration acts 1875–'77.

Form A.

*Application for Registration.**

Name of applicant, in full: —— ——.
Trading style, if any:† Joh. Rahtjen.
Address: Bremerhaven and Hamburg, both in the German Empire.
628 Calling: Manufacturers.
Length of user of trade-mark before 13th August, 1875, if any: Nineteen years and upwards.

GENUINE

RAHTJEN'S COMPOSITION

FOR SHIPS' BOTTOMS, &c.

Signature of applicant‡ or agent: John Rahtjen by Alfred J. Brookes, 59 Chancery lane, London, agent.

A separate form must be filled up for each mark claimed.
* This must be accompanied by two additional representations of the mark, each one upon a separate sheet of paper of the same size as this.
In the case of a cotton mark, in class 23, 24, or 25, four additional representations are required for each such class.
One representation of the trade-marks to be affixed within this square.
Any representation of a larger size may be folded, but must then be mounted on linen and affixed hereto.
An agent will sign the applicant's name "By so and so, agent."
If this space be not sufficient for the enumeration of goods, continue on the other side.
Should the mark be claimed in more than one class, the goods should be set out separately for each class.
† In the case of an application on behalf of a firm or of a company, the firm name or the name of the company only should be given here.
‡ Unless the application be signed by an agent: In the case of a firm, the firm name should be signed by one partner "By so and so, a member of the firm;" in the case of a company, the secretary or other principal officer should sign, as such, for the company.

Date: The 25th day of June, 1883.

Description of goods for which the trade-mark is required to be registered: In class 1.

Anti-fouling compositions, anti-corrosive compositions, compositions, varnishes and paints for ships' bottoms and other surfaces requiring protection or preservation.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

629 Office copy.

Opp. 591.

Trade-marks registration act 1875.

In the matter of an application, No. 32826, by John Rahtjen, of Bremerhaven and Hamburg, in the German Empire, manufacturer.

To the registrar of trade-marks:

We Messrs. M. Holzapfel & Co. of 41 Quayside Newcastle-upon-Tyne merchants and manufacturers hereby give notice that we oppose the registration of the trade-mark advertised under the above number for class 1 in the Trade-marks Journal of August 29th, 1883 No. 289 page 486

The grounds of opposition are as follows

1. The right to use the said mark never belonged nor does it belong to the applicant

2. The said mark has never been nor is it used by the said applicant or any predecessor in title as a trade-mark

3. The said mark is not nor ever has been an old mark and was never used prior to the 13th day of August 1875 by the said applicant or any predecessor in title for the purpose of distinguishing in any market any goods manufactured by him

4. The said mark is not such an exclusive device or form of words which would constitute a mark by which the said goods could be known in any market

And divers other good grounds of opposition

Dated the 7th day of November 1883

BROWNLOW & HOWE,
11 *New Court, Lincoln's Inn, W. C., Solicitors,*
Agents for Messrs. M. Holzapfel & Co.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

630 Patents, designs, and trade-marks, acts 1883 to 1888.

In the matter of the application No. 32826.

I, Cornelius Neale Dalton, comptroller general of patents, designs and trade-marks, hereby certify that an application was on the 25th June, 1883, made at this office for the registration of a trade-mark, a representation of which is shewn hereunder, in class 1, in respect of anti-fouling compositions, anti-corrosive compositions, compositions, varnishes, and paints for ships' bottoms and other surfaces requiring protection or preservation, in the name of John Rahtjen, of Bremerhaven and Hamburg, both in the German Empire, manufacturers, and to it the official number 32826, was given. I further certify that this application was opposed after advertisement, and no counter-statement being furnished by the applicants, was deemed to be withdrawn.

Such application stated that the said trade-mark had been used for nineteen years and upwards before the 13th August, 1875.

Witness my hand and seal this 25th day of November, 1898.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller General.

Genuine Rahtjen's composition for ships' bottoms, &c.

The patent office: Trade-marks branch 25 Southampton buildings, London.

631 DEFENDANT'S EXHIBIT CERTIFIED COPY APPLICATION, OPPOSITION, AND WITHDRAWAL OF SUTER HARTMANN & CO. No. 32858 OF 1883.

Office copy 32858.

Trade-marks registration acts, 1875–'77.

Form A

*Application for Registration.**

Name of applicant in full: Suter Hartmann & Co.
Trading style, if any: † —— ——.

A separate form must be filled up for each mark claimed.

*This must be accompanied by two additional representations of the mark, each one upon a separate sheet of paper of the same size as this.

In the case of a cotton mark, in class 23, 24, or 25, four additional representations are required for each such class.

One representation of the trade-mark to be affixed within this square.

Any representation of a larger size may be folded, but must then be mounted on linen and affixed thereto.

An agent will sign the applicant's name "by so and so, agent."

If this space be not sufficient for the enumeration of goods, continue on the other side.

Should the mark be claimed in more than one class, the goods should be set out separately for each class.

† In the case of an application on behalf of a firm or of a company, the firm name or the name of the company only should be given here.

632 Address: 18 Billiter street, in the city of London.
Calling: Merchants and manufacturers.
Length of user of trade-mark before 13th August, 1875, if any: About one year and a half.

RAHTJEN'S

PATENT COMPOSITION.

FOR SHIPS' BOTTOMS, BUOYS, &c.

None genuine without this signature.

SUTER HARTMANN & CO.

Signature of applicant * or agent: Suter Hartmann & Co. by William Hartmann, a member of the firm.
Date: The twenty-eighth day of June, 1883.
Description of goods for which the trade-mark is required to be registered: In class 1. Composition for ships' bottoms and the like being an anti-fouler.
I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

633 Office copy.

Opp. 589.

Trade-marks Registration.

In the matter of an application, No. 32858, by Suter Hartmann & Co., of 18 Billiter street, in the city of London, merchants and manufacturers.

To the registrar of trade-marks:

1. We Messrs. M. Holzapfel & Co. of 41 Quayside Newcastle-upon-Tyne merchants — manufacturers hereby give notice that we oppose the registration of the trade-mark advertised under the above num-

* Unless the application be signed by an agent: In the case of a firm, the firm name should be signed by one partner "by so and so, a member of the firm" in the case of a company, the secretary or other principal officer should sign, as such, for the company.

ber for class 1 in the Trade-marks Journal of the 15th day of August 1883 No. 288 page 469

2. The grounds of opposition are as follows

3. The right to use the said mark never belonged nor does it belong to the applicants

4. The said mark has never been nor is it used by the said applicants or any predecessor in title as a trade-mark

5. The said mark is not nor ever has been an old mark and was never used prior to the 13th day of August 1875 by the said applicants or any predecessor in title for the purpose of distinguishing in any market any goods manufactured by them. The said mark is not such an exclusive device or form of words which in themselves would constitute an ear-mark by which the said goods could be known in any market

6. And divers other good grounds of opposition

Dated the 7th day of November 1883

BROWNLOW & HOWE,
11 *New Court, Lincolns Inn, W. C., Solicitors,*
Agents for Messrs. M. Holzapfel & Co.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller.

(Revenue stamp.)

No. 32858.

In the matter of the application No. 32858.

I, Cornelius Neale Dalton, comptroller general of patents, designs, and trade-marks, hereby certify that an application was on the 28th June, 1883, made at this office for the registration of a trade-mark, a representation of which is shewn hereunder, in class 1, in respect of composition for ships' bottoms and the like, being an anti-fouler, in the name of Suter, Hartmann & Co., of 18, Billiter street in the city of London, merchants and manufactures, and to it the official number 32858 was given. I further certify that this application was opposed after advertisement and was finally withdrawn by the applicants.

Such application stated that the said trade-mark had been used about one year and a half before the 13th August, 1875.

Witness my hand and seal this 18th day of November, 1898.

[Seal of Patent Office.]

C. N. DALTON,
Comptroller General.

635 RAHTJEN'S

PATENT COMPOSITION

FOR SHIPS' BOTTOMS, BUOYS, &C.

None genuine without this signature.

SUTER, HARTMANN & CO.

The patent office: Trade-marks branch, 25, Southampton buildings, London.

CONSULATE GENERAL OF THE UNITED STATES OF AMERICA FOR GREAT BRITAIN AND IRELAND, AT LONDON.

I, William M. Osborne, consul general of the United States of America for Great Britain and Ireland at London, do hereby make known and certify to all whom it may concern, that the signature "C. N. Dalton" subscribed to the annexed certificate, is of the true and proper handwriting of Cornelius Neale Dalton comptroller general of patents, designs, and trade-marks. That the seal affixed to the said certificate is the seal of the patent office and that to all acts signed as the annexed full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed the seal of the consulate general of the United States at London, aforesaid, this 18th day of November, 1898.

[U. S. Consulate Seal.]

WM. M. OSBORNE,
Consul General.

636 DEFENDANT'S EXHIBIT CERTIFIED COPY SUTER, HARTMANN & CO. APPLICATION FOR TRADE-MARK 34919 OF 1884.

(Copy.)

Patents, designs, and trade-marks act, 1883.

34919. Form F.

Application for Registration of Trade-mark.

Trade-marks 5/ stamp.

RAHTJEN'S

PATENT COMPOSITION,

FOR SHIPS' BOTTOMS, BUOYS, &c.

Directions.

SUTER, HARTMANN & CO.

You are requested to register the accompanying trade-mark in class 1, in respect of (*a*) compositions for ships' bottoms and the like, being an anti-fouler in the name of (*b*) Suter, Hartmann & Co., 18 Billiter street in the city of London, merchants and manufact-
637 urers who claim to be the proprietors thereof (*c*). The said firm have used the said trade-mark upon the said goods since about one year and a half before the 13th August, 1870.

SUTER, HARTMANN & CO.,
(Signed) By WILLIAM HARTMANN,
A Member of the Firm.

Dated the 9th day of Jan'ry, 1884.

To the comptroller, patent office, trade-marks branch, 25 Southhamptom buildings, Chancery lane, London, W. C.

NOTE.—If the trade-mark has been in use in respect of the goods since before August 13th, 1875, state length of such user.

(*a*.) Only goods contained in one and the same class should be set out here. A separate application form is required for each separate class.

(*b*.) Here insert legibly the full name, address, and description of the individual, firm, or company. Add trading style (if any).

(*c*.) Alter to "claim to be the proprietors thereof" in the case of a firm or company.

(*d*.) To be signed by the applicant.

One representation to be fixed within this square, and two others to be sent on separate half sheets of foolscap.

Representations of a larger size may be folded, but must be mounted upon linen and affixed thereto.

(Endorsed.)

We do not claim the exclusive use of the words "Rahtjen's patent composition for ships' bottoms, buoys, etc., directions" or any of such words, except as part of the combination constituting our trade-mark as represented annexed, and to which we claim exclusive right.

SUTER, HARTMANN & CO.,
(Signed) By WILLIAM HARTMANN,
A Member of the Firm.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON, *Comptroller.*

(Revenue stamp.)

638 Office copy of register of trade-marks.

No.: 34919, class 1.
Name: Suter, Hartmann & Co.
Address: 18 Billiter street, London.
Description: Merchants and manufacturers.
Description of goods: Composition for ships' bottoms and the like, being an anti-fouler.
User claimed: Since about one year and a half before 13″ August 1875.
Date of registration: 11″ January 1884.
Reference to representation of trade-mark: Volume 140.
Copy of disclaimer appearing in the application: "We do not "claim the exclusive use of the words Rahtjen's patent composition "for ships' bottoms, buoys, etc." "directions" or any of such words except as part of the combination constituting our trade-mark as represented annexed, and to which we claim exclusive right.

(Signed) SUTER HARTMANN & CO.,
By WILLIAM HARTMANN,
A Member of the Firm.

Date of registration: 30″ August 1888 assigned to Suter Hartmann and Rahtjen's Composition Company Limited of 18 Billiter street in the city of London.
11″ January 1898. Registration renewed.
I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON, *Comptroller.*

(Revenue stamp.)

639 DEFENDANT'S EXHIBIT CERTIFIED COPY TRADE-MARK TO HARTMANN BROS., NO. 32194 OF 1883.

(Copy) 32194.

Trade-marks registration acts, 1875–'77.

Form A.

*Application for Registration.**

Name of applicant, in full } Hartmann Brothers.
Trading style, if any † }

Address: 18 Billiter street, in the city of London, and Canning Town works, Canning Town, Essex.

Calling: Merchants and manufacturers.

Length of user of trade-mark before 13th August, 1875, if any: New mark.

Signature of applicant ‡ or agent: Hartmann Brothers, by William Hartmann, a member of the firm.

Date: The twenty fifth day of April 1883.

640

A separate form must be filled up for each mark claimed.

*This must be accompanied by two additional representations of the mark, each one upon a separate sheet of paper of the same size as this.

In the case of a cotton mark, in class 23, 24, or 25, four additional representations are required for each such class.

One representation of the trade mark to be affixed within this square.

Any representation of a larger size may be folded, but must then be mounted on linen and affixed hereto.

An agent will sign the applicant's name "by So-and-so, agent."

If this space be not sufficient for the enumeration of goods, continue on the other side.

Should the mark be claimed in more than one class, the goods should be set out separately for each class.

†In the case of an application on behalf of a firm or of a company, the firm name or the name of the company only should be given here.

‡Unless the application be signed by an agent: in the case of a firm, the firm name should be signed by one partner "by So and so, a member of the firm;" in the case of a company, the secretary or other principal officer, should sign as such, for the company.

Description of goods for which the trade-mark is required to be registered: In class 1. Chemical substances used in manufactures, photography and philosophical research, anti-corrosives and anti-foulers.

I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON, *Comptroller.*

(Revenue stamp.)

Office copy of register of trade-marks.

Class 1.

No. of application: 32194.
Date of entry in register: 23rd November 1883.
Application received: 27th April 1883.
Name of owner: Hartmann Brothers.
Address: 18, Billiter street, London and Canning Town works Canning Town, Essex.
Calling: Merchants and manufacturers.
Description of mark:
641 Description of goods: Chemical substances used in manufactures, photography and philosophical research, anti-corrosives and anti-foulers.
User claimed.
Reference to deposited representation volume 129.
Date of notice, rule 22.24" November 1883.
Date of registration: 30" August 1888.
Assigned to Suter, Hartmann and Rahtjen's Composition Company Limited of 18 Billiter street in the city of London.
27th April 1897, registration renewed.
I certify this to be a true copy.

[Seal of Patent Office.]

C. N. DALTON, *Comptroller.*

(Revenue stamp.)

EXTRACT FROM DEFENDANT'S EXHIBIT RAHTJEN'S CIRCULAR.

(Heading.)

Fabriken Hamburg & Bremerhaven. Etablir't 1860. Fabriken Rotterdam & London.

JOHN RAHTJEN'S

By royal letters *patent*

{ Royal coat-of-arms of England }

PATENT COMPOSITION

(On last page)

JOH. RAHTJEN'S

PATENT COMPOSITION No. I

JOH. RAHTJEN'S

PATENT COMPOSITION No. II & III

642 DEFENDANT'S EXHIBIT PETERSEN'S ADVERTISEMENT IN MARITIME REGISTER OF JUNE 4, 1890.

Hartmann's Rahtjen's Original & Genuine Compositions for Coating Bottoms of Iron Vessels.

Trade mark.

These compositions are used by nearly all the principal steamship lines.

Otto L. Petersen, importer & sole agent, 120 Broad St., New York. Telephone, 353 John.

EXTRACT FROM DEFENDANT'S EXHIBIT COMPLAINANT'S BOOKLET, DATED NEW YORK, 1893.

(Heading)

RAHTJEN'S AMERICAN

Trade mark.

COMPOSITION COMPANY.

643 EXTRACT FROM DEFENDANT'S EXHIBIT COMPLAINANT'S LIST OF VESSELS COATED FROM JULY 1ST, 1896, TO DECEMBER 31, 1896.

(On first page)

List of
Some of the vessels coated
from July 1st, 1896, to December 31st, 1896,
with
"Hartmann's Rahtjen's compositions."

(Red-hand brand)

by the
Rahtjen's American Composition Co.
26 Beaver street, New York

Trade mark.

(On last page)

The 'Hartmann's Rahtjen's genuine compositions'

(Red-hand brand)

Trade mark.

May be obtained from the following agents.

644 DEFENDANT'S EXHIBIT COMPLAINANT'S LETTER-HEAD.

Telephone No. 182 Broad — RAHTJEN'S AMERICAN — Telegraphic address "Rahtjen's," New York.

Trade mark.

COMPOSITION COMPANY.

26 BEAVER STREET, NEW YORK, ——, 189–.

DEFENDANT'S EXHIBIT COMPLAINANT'S BILL-HEAD.

Telephone No. 182 Broad. — RAHTJEN'S AMERICAN — Telegraphic address "Rahtjen's," New York.

Trade mark.

COMPOSITION COMPANY.

26 BEAVER STREET, NEW YORK, ——, 189–.

645 DEFENDANT'S EXHIBIT MARINE JOURNAL OF MARCH 18, 1899.

Rahtjen's American Composition Co.

(Hartmann manufacture.)

For coating bottoms of steel and iron vessels.

These compositions are used by nearly all principal steamship and yacht owners.

Otto L. Petersen, president.

Telephone, 182 Broad; office, 26 Beaver street; factory, 69 Vandyke street, Brooklyn, N. Y.

DEFENDANT'S EXHIBIT CIRCULAR OF LONDON OIL & COLOR CO. OF 1886.

The original Rahtjen composition.

For ships' bottoms.

Manufactured by the London Oil and Color Company at 40, 41, & 42 Brewers street, Antwerp.

Trade (symbol) mark.

We beg to inform you that it has come to our knowledge that Messrs. Marshall & Gerling of this city are circulating the report that they alone have the right to sell Rahtjen's composition, as will be seen by the following extract from a letter written by them to shipbrokers in Antwerp and which has been shown to us.

"We beg to call your attention to the fact that we are the
646 "only firm, now authorized to sell Rahtjen's composition
"which has been confirmed by judgment of 5th March 1886
"of our tribunal of commerce condemning a painter here to heavy
"damages for using Rahtjen's name for a paint manufactured here."

It is true that Messrs. Marshall & Gerling brought an action on behalf of a Mr. Hartmann in the Antwerp court to prevent our using the name of Rahtjen and we were condemned to pay the heavy damages of fr. 150 not quite £6—but on our appeal to the Brussels court they not only lost the day, but were obliged to pay the law expenses of the two actions and the court confirmed our right to manufacture this composition, using the name of Rahtjen's as we have hitherto done.

THE LONDON OIL & COLOR COMPANY.

Antwerp, 15 July, 1866.

The London Oil and Color Company of 40, 41 and 42 Brewers street, Antwerp, are manufacturing this article at one-half the original price and guarantees its perfect genuineness, according to the specification lodged at the patent office in London some years ago by Mr. Rahtjen the patentee.

Since this company commenced making this article, they have coated steamers measuring together upwards of two hundred thousand tons, and in every instance every satisfaction has been given; they are willing to do one side of any vessel against any other composition for the sum of £100.

This company beg to caution their customers and others, against certain people advertising that they alone know the secret, and none but their make is genuine, and to deny most emphatically the truth of the statement, as the secret can be got by any one applying at the patent office in London.

Many people are not aware that the patent has long since expired,

and that a spurious article has been imported here, made ex-
647 pressly to avoid the duty, containing naphtha, whereas the genuine is made from pure spirits of wine and subject to a duty when imported.

Ship painters and decorators.

Paint manufacturers.

Wholesale engine and deck store dealers.

Dry-dock agents.

Advantages of our Rahtjen's compositions.

Gain in speed.

Thorough protection against rust, grass, & barnacles.

Dries quicker than any other paint.

Wonderful covering properties.

Estimates given for docking, scraping and coating.

EXTRACT FROM "DEFENDANT'S EXHIBIT HOLZAPFEL & CO.'S CIRCULARS, ADVERTISEMENTS, LETTER-HEADS, ETC."

1. Holzapfel & Co.'s circular dated April 17, 1883, notifying the trade that Holzapfel & Co. in addition to manufacturing International composition, would also manufacture Rahtjen's. This circular contains these paragraphs relating to the latter.

"It having been deemed important by many that this composition "should be manufactured in strict accordance with the specification "sworn to and deposited in the patent office by Mr. Rahtjen, we, in "bringing this article forward, undertake a guarantee that every "cask of it is made in strict accordance with the said specification, "and that only the very best materials of their respective kind will "be used by us."

648 2 & 3. Estimate blanks used by Holzapfel & Co. in 188–.

The composition in question is described thereon as "Genuine 'Rahtjen's patent'" composition.

4. Issue of Shipping & Mercantile Gazette of July 4, 1883.

This newspaper contains an advertisement of Rahtjen's composition, in the following language:

"Genuine Rahtjen's composition.

"Manufacturers—M. Holzapfel & Co., Newcastle-on-Tyne. Guar-"anteed to have been manufactured in strict accordance with Mr. "Rahtjen's patent. Supplied at considerably reduced prices, with "guarantee to each parcel."

5 & 6. The Shipping World—advertisements—November 1883 & October 1884.

Holzapfel & Co. advertise in both issues their manufacture of

"Genuine Rahtjen's composition. Warranted to be made according "to patent."

7. Holzapfel & Co.'s letter-heads of 1886.

This sets out that they are

"Sole proprietors of the International anti-fouling composition.

"Manufacturers of genuine 'Rahtjen's patent' composition."

8. Issue of the Lighthouse of Feb. 11, 1888.

This contains an advertisement of Holzapfel & Co.'s genuine "Rahtjen's patent" composition.

9. Issue of Lloyds Weekly Shipping Index of June 15, 1888.

This contains an advertisement of Holzapfel & Co.'s genuine "Rahtjen's patent" composition.

10. Issue of the Shipping World—advertisements—of Jan'y 1, 1889.

649 This contains an advertisement of Holzapfel & Co.'s

"Genuine 'Rahtjen's patent' composition.

"Supplied at considerably reduced prices. Warranted made ac- "cording to Rahtjen's original specification."

11. Holzapfel & Co.'s circular of Jan. 1890, announcing formation of Holzapfel's Composition Co. Ld., and transfer of their business to said company. The heading describes them as

"Sole proprietors of the International anti-fouling composition.

"National anti-fouling composition.

"Manufacturers of genuine 'Rahtjen's patent' composition."

12. Issue of the Lighthouse, of Feb. 1, 1890.

This contains an advertisement of

"Genuine 'Rahtjen's patent' composition, Holzapfel's manufact- "ure, made according to the original specification."

13. Circular of Holzapfel's Composition Co. Ld. of July, 1891.

This contains the following:

"The specialties of the company are as follows:

* * * * * * *

"Genuine Rahtjen's composition,

"supplied with guarantee of analysis, at reduced prices. Please "note that the patent for this composition expired more than 10 "years ago and that no firm has any legitimate right to charge fancy "prices for Rahtjen's composition at the present moment."

14. Circular of Holzapfel's Compositions Co. Ld. of Jan., 1892.

This advertises the Co. as

"Manufacturers of Holzapfel's genuine 'Rahtjen's patent' composition.

"Supplied at considerably reduced prices. Warranted made according to Rahtjen's original specification."

650 15. Issue of Lloyds Weekly Shipping Index, of June 10, 1893.

This contains an advertisement of the Holzapfel's Composition Co. Ld. as

"Manufacturers of genuine 'Rahtjen's patent' composition "Holzapfel's manufacture, made according to the original specification."

16. Circular of Holzapfel's Compositions Co. Ld. of 1894.

This contains an advertisement of their

"Genuine Rahtjen's composition, guaranteed to be made in strict "accordance with the original patent, can be supplied in drums of 2 "or 10 gallons each. Price—priming 12/— per gallon, anti-fouling No. III 16/6 per gallon. Drums extra, but allowed for in full "if returned, carriage paid, to Gateshead-on-Tyne."

17. Issue of the Shipping World—advertisements Aug. 1, 1895.

This contains an advertisement of Holzapfel's Compositions Co. Ld. as

"Manufacturers of Holzapfel's genuine 'Rahtjen's patent' composition. Supplied at considerably reduced prices. Warranted "made according to Rahtjen's original specification."

18. Circular of Gastaldi & Co. (agents of Holzapfel's Composition Co. Ld., in Genoa) that they had on sale said company's "Genuine 'Rahtjen's patent' composition."

651 DEFENDANT'S EXHIBIT LETTERS FROM INDIA OFFICE.

It is requested that in any further communication on this subject the undermentioned letter and number may be quoted and the reply addressed to the director general of stores, India office, Whitehall, London, S. W.

S. 9934.

Telegraphic address, Indiamen, London.

INDIA OFFICE, WHITEHALL, S. W., 22*nd August*, 1899.

GENTLEMEN: As desired in your letter of 17th August 1899 I enclose a copy of the letter dated 14th July 1886 informing Messrs. Holzapfel & Co., that they had been placed on the list of contractors to this department for the supply of Rahtjen's composition.

I am, gentlemen, your obedient servant,

R. G. CROZIER,
Deputy Director General of Stores.

Messrs. Holzapfel's Compositions Co., Ld., Maritime buildings, Newcastle-on-Tyne.

A. 4883.

INDIA OFFICE, 14*th July*, 1886.

GENTLEMEN: With reference to your letter dated the 12th May 1886, I have to inform you that your name has been placed
652 on the list of contractors to this department for the supply of Rahtjen's composition.

The sample No. 3 submitted by you contained 5 per cent. less oxide of iron than is usual in supplies sent to India by this department. Should you obtain an order for such composition you will be required to supply in accordance with the departmental standard.

I am, &c.,

(S'd) A. A. JOPP,
Director General of Stores.

Messrs. Holzapfel & Co., Quayside, Newcastle-on-Tyne.

DEFENDANT'S EXHIBIT DONALD & COMPANY'S LETTER-HEAD OF AUGUST, 1889.

Printed Estimate of Donald & Company of Dec. 12th, 1889; Printed Estimate of Donald and Company, June 21st, 1890.

(*Donald & Co.'s Letter-head of Aug.*, 1889.)

Western Steam Navigation Company, Limited.

Agency of M. Holzapfel & Co., Newcastle-on-Tyne.

Sole proprietors of the International anti-fouling composition.

National anti-fouling composition.

Manufacturers of genuine "Rahtjen's patent composition."

653 (*Printed Estimate of Donald & Co. of Dec.* 12, 1889.)

MEMORANDUM.

NEW YORK, 12 *Dec*, 1899.

From John A. Donald & Co., 84 Broad street, New York.
To Messrs. Bowring & Archibald, Beaver St.

Sole agents in the United States for the International anti-fouling composition and genuine "Rahtjen's patent" composition (Holzapfel's manufacture) for ships' bottoms.

In case you decide to dry-dock your bq. "Beechdale" here this voyage we shall be glad to attend to her as under:

Clean and scrape the ship fit for painting, find tools, labour and material for two good coats of Rahtjen's patent anti-corrosive & anti-fouling compositions from keel to light-line, and one good coat of flesh-colour boot-top, of usual height, for the sum of $240.

The favor of your orders will oblige,

Yours truly, JNO. A. DONALD & CO.

(*Printed Estimate of Donald & Co. of June* 21, 1890.)

MEMORANDUM.

NEW YORK, 21 *June*, 1890.

From John A. Donald & Co., Welles building, 18 Broadway, New York.

To Captain Lardner, ship "Erne."

Sole agents in the United States for the International anti-fouling composition and genuine "Rahtjen's patent" composition (Holzapfel's manufacture) for ships' bottoms.

654 In case you decide to dry-dock your ship "Erne" here this voyage we shall be glad to attend to her as under:

Clean and scrape the ship fit for painting, find tools, labour, and material for two good coats of Rahtjen's genuine patent anti-corrosive & anti-fouling composition, from keel to load line, of usual height, for the sum of $360.

The favour of your orders will oblige,

Yours truly, JNO. A. DONALD & CO.

Agreed.

D. S. LARDNER,
Master, Ship "Erne."

DEFENDANT'S EXHIBIT DONALD & CO.'S ADVERTISEMENT OF JUNE 4, 1890.

Holzapfel's Compositions Co., Ltd.

Manufacturers and sole proprietors of Holzapfel's patent soapstone composition for protecting steel & iron ships & other structures against rust, etc.

655 The most reliable paint against atmospheric influences, the cheapest and best paint manufactured.

(Quick-drying.)

Holzapfel's International anti-fouling composition
(The strongest anti-fouler made).

Holzapfel's National anti-fouling composition
(For the North Atlantic trade).
(Compares favourable in price)
(with ordinary oil paint.)

Manufacturers of genuine Rahtjen's patent composition.
(Holzapfel's manufacture)
(made according to the)
(original specification).

Agents in New York: John A. Donald & Co., Welles building, 18 Broadway.

656 DEFENDANT'S EXHIBIT DONALD & CO.'S AGENT'S CARD.

N. T. GORHAM,

Sole Agent for Boston of

HOLZAPFEL'S GENUINE "RAHTJENS'S PATENT" COMPOSITION.

29 *West Sumner Street, East Boston.*

Connected by telephone.

657 United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION CO.
vs.
HOLZAPFEL'S COMPOSITIONS CO. } In Equity.

A motion to suppress a deposition for refusal of the witness to answer certain cross-interrogatories has been brought into the hearing. The refusal might have been corrected if the proceeding against it had been brought on while an opportunity to correct it could be afforded. Not having been so treated, the refusal would seem to be waived. The motion is therefore denied.

Rahtjen's composition appears to have become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it and not an indication of its origin as from him or under his right. The article advertised for by the Government in calling for the bids which are claimed to be an infringement or unfair in competition was this product however produced, and not the product produced by or under him. To bid for furnishing such a well-known article by whatever name known that would describe it would not seem to be actionable according to any established principles of law.

658 Let decree be entered dismissing the bill.

HOYT H. WHEELER.

Thomas B. Kerr, Timothy D. Merwin, for plaintiff.
William McAdoo, P. F. B. Sands, R. B. McMaster, for defendant.

(Endorsed:) Rahtjens *v.* Holzapfel. Opinion. Wheeler, J. U. S. circuit court. Filed Nov. 22, 1899. John A. Shields, clerk.

At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the court-rooms thereof, in the city of New York, on the 29th day of November, 1899.

Present: Hon. Hoyt H. Wheeler, judge.

RAHTJEN'S AMERICAN COMPOSITION COMPANY
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED. } In Equity.

This cause having come on to be heard upon the pleadings and proofs of the parties hereto, at a stated term of this court, and having been argued by counsel for the respective parties hereto,
659 and due deliberation and consideration having been had thereon—

Now, on motion of McAdoo & McAdoo, solicitors for the defendant above named, it is

Ordered, adjudged and decreed, that the complainant's said bill of complaint be and the same hereby is dismissed.

And it is further ordered, adjudged and decreed, that the defendant has not violated or infringed any trade-mark or trade name rights of the complainant.

And it is further ordered, adjudged and decreed, that the "Rahtjen's compositions" have become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it, and not an indication of its origin as from him or under his rights.

And it is further ordered, adjudged and decreed, that the defendant recover of the above-named complainant the cost of this suit, and that said defendant have execution therefor.

HOYT H. WHEELER.

Approved as to form.

TRACY, BOARDMAN & PLATT,
Complainant's Solicitors.

(Endorsed:) United States circuit court, southern district of New York. In equity. Rahtjen's American Composition Company *vs.* Holzapfel's Compositions Co., Limited. Decree. McAdoo & McAdoo, solicitors for defendant, 15 Wall street, New York city. U. S. circuit court. Filed Nov. 29, 1899. John A. Shields, clerk.

660 United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant.
} In Equity.

Assignment of Errors.

The Rahtjen's American Composition Company, complainant and appellant, makes the following assignment of errors in the above-entitled cause and in the decree entered therein:

(1.) That said circuit court erred in that it ordered, adjudged and decreed that the "Rahtjen's compositions" have become a valuable article of commerce well known by that name throughout the maritime world, through Rahtjen's unexpired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it and not an indication of its origin as from him or under his rights.

(2.) That said circuit court erred in that it ordered, adjudged and decreed that the defendant has not violated or infringed any trade-mark or trade-name rights of the complainant.

(3.) That the circuit court erred in that it ordered, adjudged and decreed that the bill of complaint be dismissed.

661 (4.) That said court erred in that it ordered, adjudged and decreed that the defendant should recover from the complainant the costs of the suit.

(5.) That said court erred in that it did not order, adjudge and decree that the trade-mark "Rahtjen's composition" is a good and valid trade-mark, and that the complainant has exclusive right to use the same throughout the United States.

(6.) That said circuit court erred in that it did not order, adjudge and decree that the defendant has infringed said trade-mark and complainant's exclusive rights to the use of the same.

(7.) That said circuit court erred in that it did not order, adjudge and decree that the defendant has been guilty of unfair competition in business with the complainant.

(8.) That said circuit court erred in that it did not order, adjudge and decree that said defendant, its agents, servants and employees and any and all claiming and holding through or under it to be forever enjoined and restrained from infringing upon the said exclusive rights of the complainant in manner and form as prayed in said bill of complaint.

(9.) That said circuit court erred in that it did not order, adjudge and decree that said defendant pay to the complainant its unlawful profits and income by it derived and diverted from complainant in and by its infringing acts and unfair competition in business, and the damages sustained by the complainant by reason of said acts,

together with the costs of this suit, and that an accounting be had to assess the amount of the same.

Dated New York city, November 29, 1899.

TRACY, BOARDMAN & PLATT,
Solicitors for Complainant, Appellant, 35 *Wall Street,*
New York City.

662 United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S AMERICAN COMPOSITIONS COMPANY, LIMITED, Defendant.

Petition on Appeal.

The above-named complainant, The Rahtjen's American Composition Company, conceiving itself aggrieved by the decree entered herein on or about the 29th day of November, 1899, dismissing the bill of complaint, does hereby appeal from said decree to the United States circuit court of appeals for the second circuit, for the reasons specified in its assignment of errors hereto attached and filed herewith, and prays that its appeal may be allowed, and that a transcript of the record and proceedings upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.

New York, Nov. 29, 1899.

TRACY, BOARDMAN & PLATT,
Solicitors for the Complainant, 35 *Wall Street,*
Borough of Manhattan, New York City.

663 And now, to wit, on December 1, 1899, it is ordered that the appeal be allowed as prayed for.

(S'g'd) HOYT H. WHEELER, *Judge.*

(Endorsed:) United States circuit court, S. D. N. Y. Rahtjen's American Composition Company, complainant, *vs.* Holzapfel's Compositions Company, Limited, defendant. Assignment of errors and petition. Tracy, Boardman & Platt, attorneys for complainant, No. 35 Wall street, New York city. Due and timely service of a copy of the within is hereby admitted. Dated New York, Dec. 4th, 1899. McAdoo and McAdoo, sol'rs for def't. U. S. circuit court. Filed Dec. 4, 1899. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Plaintiff, Appellant,
against
HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant, Respondent.

Know all men by these presents, that we, Rahtjen's American Composition Company, as principal, and the Fidelity and
664 Deposit Company of Maryland, as surety, are held and firmly bound unto the defendant, Holzapfel's Compositions Company, Limited, in the full and just sum of one thousand dollars, to be paid to the said defendant, its certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our corporate seals. Dated this twenty-ninth day of November, one thousand eight hundred and ninety-nine.

Whereas, lately, and at a circuit court of the United States for the southern district of New York, in the second circuit, in a suit depending in said court between the plaintiff and defendant herein above named, it was ordered and decreed that the complainant's bill of complaint be dismissed; that the defendant had not violated or infringed any trade-mark or trade-name rights of the complainant; that the "Rahtjen's compositions" had become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it, and not an indication of its origin as from him or under his rights; and that the defendant recover of the complainant the cost of said suit; and the said complainant having appealed therefrom and filed a copy thereof in the clerk's office of the said court to reverse the said order or decree, and a citation directed to the said defendant, citing and admonishing it to be and appear at the next session of the United States circuit court of appeals, for the second circuit, to be holden at the city of New York:

Now, the condition of this obligation is such, that if the said Rahtjen's American Composition Company shall prosecute its said appeal
665 to effect, and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

RAHTJEN'S AMERICAN COMPOSITION COMPANY.
[SEAL.] OTTO L. PETERSEN, *President.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
HENRY B. PLATT, *Vice-President.*

Attest:
[SEAL.] JOHN W. WOOTEN, *Attorney.*

(Stamp.)

STATE OF NEW YORK, } ss.:
County of New York, }

On this 29th day of November, 1899, before me personally appeared Otto L. Petersen, to me known, who, being by me duly sworn, did depose and say: That he resided in the city of New York; that he was the president of the Rahtjen's American Composition Company, the corporation described in, and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

666 STATE OF NEW YORK, } ss.:
County of New York, }

On the 29th day of November, in the year 1899, before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say: That he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the year 1893. And the said Henry B. Platt further said that he was acquainted with John W. Wooten, and knew him to be the attorney of said company; that the signature of the said John W. Wooten, subscribed to the within instrument, was in the genuine handwriting of the said John W. Wooten, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Henry B. Platt.

ERNEST L. HICKS,
Notary Public, New York County.

At a regular meeting of the board of directors of the Fidelity and Deposit Company of Maryland, held at the office of the company in the city of Baltimore, State of Maryland, on the first day of June, 1898, at which was present a quorum of said directors, duly authorized to act in the premises, on motion, it was unanimously—

"Resolved, That in pursuance of section eight hundred and
667 "eleven of the Code of Civil Procedure of the State of New
"York, Henry B. Platt, vice-president, or John W. Wooten,
"attorney, or Frank H. Platt, Theodore F. Wood, Edward T. Platt,
"Joseph A. Flynn and Hugh M. Allwood, attorneys-in-fact of this
"company in the State of New York, be, and each of them is, hereby
"authorized and empowered to sign, execute and deliver any and all
"bonds or undertakings for or on behalf of this company, and to

"attach thereto the seal of the corporation, the same to be attested "by the said John W. Wooten, attorney of the company, or by "either one of the other persons above named, as occasion may "require."

COUNTY OF NEW YORK, *ss.:*

I, John W. Wooten, attorney of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution. Given under my hand and seal of the company, at the city of New York, this 29th day of November, 1899.

JOHN W. WOOTEN, *Attorney.*

Fidelity and Deposit Company of Maryland.

Statement, March 30th, 1899.

Resources.		*Liabilities.*	
Real estate	$600,000 00	Capital stock	$1,500,000 00
Stocks and bonds	1,541,527 00	Surplus and undivided profits	2,012,902 22
Railroad bonds	1,171,077 50	Premium reserve	552,104 50
Net premiums due	153,824 13	Claims in process of adjustment	7,020 72
Cash in bank, &c	630,664 37	Claims reported; proof not filed	25,065 76
	$4,097,093 20		$4,097,093 20

668 STATE OF NEW YORK, }
County of New York, } *ss.:*

John W. Wooten, being duly sworn, says: That he is the attorney of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of March 30th, 1899, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JOHN W. WOOTEN.

Subscribed and sworn to before me this 29th day of November, 1899.

ERNEST L. HICKS,
Notary Public, New York County.

(Endorsed:) Circuit court of the U. S., so. district of New York. Rahtjen's American Composition Company, appellant, against Holzapfel's Compositions Company, Limited, respondent. Bond. Tracy, Boardman & Platt, att'ys for appellant, 35 Wall St., N. Y. city. Approved Dec. 1, 1899. Hoyt H. Wheeler, judge U. S. circuit court. Filed Dec. 2, 1899. John A. Shields, clerk.

669 United States Circuit Court, Southern District of New York.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant,
vs.
HOLZAPFEL'S AMERICAN COMPOSITIONS COMPANY, Limited, Defendant.
} In Equity.

UNITED STATES OF AMERICA, *ss:*

To the Holzapfel's Compositions Company, Limited:

You are hereby cited and admonished to appear before the United States circuit court of appeals for the second circuit, on the 30th day of December, 1899, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Rahtjen's American Composition Company is appellant and you are appellee, and show cause, if any there be, why the decree in said appeal mentioned should not be reversed, and speedy justice should not be done in that behalf.

Given under my hand on the 1st day of December, 1899.

HOYT H. WHEELER, *Judge.*

(Endorsed:) United States circuit court, S. D. N. Y. Rahtjen's American Composition Company, complainant, *vs.* Holzapfel's Compositions Company, Limited, defendant. Original citation. Tracy, Boardman & Platt, attorneys for complainant, No. 35 Wall street, New York city. Due and timely service of a copy of the
670 within is hereby admitted. Dated New York, Dec. 4th, 1899. McAdoo and McAdoo, solicitors for deft. U. S. circuit court. Filed Dec. 14, 1899. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 670 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Rahtjen's American Composition Company, complainant appellant, against Holzapfel's American Compositions Company, Limited, defendant appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fifth day of December, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Stamp.)

(Endorsed:) United States circuit court of appeals for the second circuit. Rahtjen's American Composition Company, compl't appellant, *vs.* Holzapfel's Compositions Company, Limited, def't appellee. Transcript of record from the circuit court of the United States for the southern district of New York. United States circuit court of appeals, second circuit. Filed Dec. 5, 1899. William Parkin, clerk.

671 United States Circuit Court of Appeals for the Second Circuit.

Submitted February 28, 1900; decided April 11, 1900.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant, Appellant,
vs.
HOLZAPPEL'S COMPOSITION COMPANY, LIMITED, Defendant, Appellee.
} No. 119, October Term, 1899.

Appeal from the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

SHIPMAN, *Circuit Judge:*

John Rahtjen invented in Germany, between the years 1860 and 1865, paints specially prepared to protect the hulls of steel and iron ships from rust, and also from becoming covered by growths animal or vegetable in character. In connection with his sons, he began in 1865 to manufacture for general use, and the paints speedily acquired a high reputation in the maritime world under the name of Rahtjen's composition. After his death in 1873, the business was continued in Germany by his sons, and is now carried on by John Rahtjen and Heinrich Rahtjen under the firm name of "John Rahtjen." In 1869 the Rahtjens made Henry Gelien of Hoboken, their exclusive agent to sell their paint in the United States with the provision that it shall be brought on the market under the name of "Rahtjen's composition," and with the information that no patent would be applied for in this country. Gelien issued a show-card for the purpose of advertising the paint under its trade name, copyrighted the card,
672 advertised the paint in other ways and sold it under this trade name to the extent of about $17,500 until the end of 1877, when he was succeeded by Hartmann, Le Doux & Maecker. In January, 1878, Suter, Hartmann & Co. of London, were appointed sole agents for the sale of the paint in this country, for whom the Hartmann firm acted as subagents for a time. The Suter Company was succeeded in 1888 by the Suter, Hartmann & Rahtjen Composition Company, Limited, which was succeeded in 1891 by the complainant corporation, which was organized under the laws of the State of New York. During the entire period from 1869 to the commencement of this suit, the goods were continuously advertised and sold under the name Rahtjen's composition, and the value and commercial importance of the article which Rahtgen originated and which, as made by his firm and their successors and sold in this

country, has been distinctly and widely known. The packages which came to this country from 1869 to July, 1879, were sent from Germany and were marked "Rahtjen's composition" or "Rahtjen's patent composition." From 1879 to 1883, upon each package which came to this country from the complainant's predecessors was stenciled the words Rahtjen's composition in some form. Since 1883 the drums which contain the paint have been marked,

Genuine
Rahtjen's composition
Trade (symbol of open hand) mark.
Hartmann's
Manufacture.

The origin of the words Hartmann's manufacture will be stated hereafter.

The complainant's gross business in this paint in 1897 was $128,300, in 1898, was $145,200, and in the last six months of 1898 was $106,000.

The firm of John Rahtjen has continued to manufacture in Germany, without patent protection. In 1871 the English firm of Suter, Hartmann & Co. was formed to sell Rahtjen's composition
673 in England and became the sole agents of the firm of John Rahtjen for that purpose. All the paint was manufactured in Germany by the Rahtjens until 1874, when they built a factory in Liverpool, having obtained on November 29, 1873, an English patent for the product. They continued the manufacture in Liverpool until February, 1880, when they assigned their leasehold interest in the factory and the patent and the exclusive right to manufacture the paints for sale in Great Britain and the United States to Hartmann Brothers, who carried on the manufacture under an agreement with the Rahtjens, from 1880 until Suter, Hartmann & Rahtjen's Composition Co., Limited, was formed in 1888. Suter, Hartmann & Co. remained the salesmen until 1888, when the corporation became both the manufacturers and the vendors. The English patent, which was apparently the only one ever taken out for the paint, was forfeited for non-payment of dues on November 29, 1880.

During the manufacture by Hartmann Brothers, the Rahtjens were also manufacturing in Germany, and to distinguish the English product, Hartmann Brothers marked their drums Hartmann's manufacture, and adopted in 1883 an open hand usually colored red with the word "composition" above and the words "Hartmann's manufacture" below the hand, as their trade-mark for all their paints, including Rahtjen's. Suter, Hartmann & Rahtjen Composition Co., Limited, obtained the same trade-mark in the United States in 1889. Hartmann, Le Doux & Maecker had obtained a United States trade-mark in 1885 for the words "Rahtjen's composition." The complainant is the owner of the good will and trade-mark rights of its predecessors and is their successor in ownership thereof. The assignment of the trade-mark of 1885 by Hartmann, Le Doux &

Maecker to Hartmann Brothers was not apparently acknowledged and has not been proved by the witness to the signature. In 1883, after the Rahtjen's patent expired, three brothers under the name of Holzappel & Co. commenced to manufacture Rahtjen's composition in connection with their other paints, and in 1890, became a
674 joint stock company under the name of Holzappel's Composition Co., Limited, which was organized under the laws of Great Britain and is the defendant. A. C. Holzappel, who joined them in 1887, had been from 1875 to November 1881, an agent of Suter, Hartmann & Co., or connected with them or with a member of that firm in the sale of Rahtjen's composition.

In 1890, the defendant or its predecessors began to send its Rahtjen's composition and other paints to John A. Donald & Co. of New York for sale, and in 1894 the defendant took the business and has since carried it on in this country in its own name. It manufactures and sells other paints, the leading brand being called the "International," which kind it makes special effort to sell. The business of the defendant in the United States from 1890 to 1895, including a few small invoices sent to different persons from 1883 to 1890 amounting to about 92 hundredweight, was a fraction over 2,142 hundredweight. It has always been sold as Rahtjen's composition, Holzappel's manufacture and no effort has been made to conceal the fact that the defendant was the manufacturer. After the English patent expired, the successors of Rahtjen attempted to obtain an English trade-mark bearing the name of Rahtjen, but were unable to do so except upon a disclaimer of an exclusive use of the words "Rahtjen's patent composition for ships' bottoms, buoys, &c., or of any of such words except as a part of the combination constituting our trade-mark."

Although minor issues of fact were presented in the proofs, the facts which have been recited are those of chief importance in the case, with the exception of those bearing upon the question of laches.

The defendant's case rests mainly upon the position that after the forfeiture in 1880 of the English patent of 1873, the name Rahtjen's composition became generic in this country, and the article could be manufactured and sold in this country by any person who described himself as the manufacturer. Reliance is placed upon the case of Singer Mfg. Co. *v.* June Mfg. Co. (163 U. S., 169).

675 It appears that the firm of John Rahtjen introduced their paint into this country in 1869 and preferred not to attempt to obtain the protection of a patent, but to gain both reputation and protection by the character of the article and for that purpose required that it should be sold as their product, and under a trade designation. That system has been continued by each owner of the business in this country to the present time, and the name of the inventor has become fastened upon the products. If a trade-mark exists in this country in the name of Rahtjen's composition, the complainant is the owner of it by virtue of the right of succession, as stated in the well-known case of The Lepage Co. *v.* Russia Cement Co. (51 Fed. Rep., 941).

"It is equitable that a manufacturer or dealer, who has given reputation to any article, should have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law, and with justice to the community, that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident; because, while it may be that this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, *and* thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created."

It further appears that after 1869, the only patent which was ever taken out in any country for the paint was the English patent of 1873, which lapsed by Hartmann & Brothers' non-payment of dues in 1880. The asserted consequence is that because the name then became *publici juris* in Great Britain it became public property everywhere. There was in 1880 a valid trade-mark right in the United States which Rahtjens and their successors had ac-
676 quired. The lapse of the English patent neither broke this trade-mark, nor interfered with the title of its owners. They owned it, and although the lapse of the English patent interfered very seriously with their title to exclusive rights in Great Britain, it was ineffectual upon title in another country. In England the Rahtjens undertook to acquire exclusive rights by virtue of the patent laws. In the United States they had previously acquired exclusive rights by the common law. Their failure in England does not cause a cessation of their common-law rights in the United States. The lapse of the English patent could not cause a lapse of trade-mark rights throughout the world.

The Singer case, *supra*, had exclusive reference to the continuance of a monopoly in this country upon which letters patent of this country had expired, and the court held that the right to use the name passed to the public in this country, with the expiration of the exclusive right created by the patent to make and sell the article. The decision followed the previous general course of decisions in the courts of this country and elsewhere, but it did not relate to the facts of this case, as obviously appears, in the opinion of Mr. Justice White, who spoke for the court. In the Scotch and English and French sewing-machine cases for an injunction against the use of the name of the maker, wherein the injunction had been granted, the machines had not been patented in those countries. In the French case of Howe, where the French courts enjoined the use of that name on a sewing machine, the court as a basis of its decree, used the following language: "And whereas, they (Howe and his heirs) did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain, and have never, either expressly or tacitly, abandoned the right to affix his name (that of Howe) to the products of the invention." (Singer

case, *supra*, pp. 195, 196, 199.) It is a matter of common knowledge that Howe took out patents upon his machine and its improvements in this country.

Attention is called by the defendant to two continental de-
677 cisions, one of the Brussels court of appeals, and the other of the criminal chamber of the "land" court at Hamburg, in cases respecting the exclusive right of the Rahtjens to the trademark. The Brussels decision was based upon the fact, as found, that in Belgium the name indicated an article and not the maker. The attempt is made in this case to show that in the public mind in this country, the name of Rahtjen's composition is a descriptive name which is understood to designate a thing and not its origin, as for example, the word "Hansom" when applied to a cab now means simply a particular style of vehicle.

We are not able to find from the record, as a fact, that in the United States the name Rahtjen's composition has become a generic name, and now means a composition made by any one after the original formula of Rahtjen. A few witnesses say that they supposed that the complainant and the defendant were competitors in the manufacture of an article called by the same name, but the testimony does not show that the fact exists in this country which was found by the Brussels court of appeals that "in the eyes of the public, this name of Rahtjen has become a sort of qualifying adjective indicative of this special product."

The Hamburg case was a criminal one, founded upon a criminal statute, and the representatives of Holzappel were not found to have committed the offense which was defined by the existing statute and which was, in substance, having knowingly made untrue statements of fact.

The defendant next insists that the complainant's laches should prevent any decree in its favor. It is true that the defendant has sold its manufacture of Rahtjen's composition to a certain extent since 1890, but the sales have been comparatively small, and did not interfere with the complainant's business to any marked extent until the defendant obtained a contract with the Naval Department of the U. S. Government in answer to a call for offers of "Rahtjen's composition, when suit was promptly commenced. The defendants'
chief brand of paint is the 'International composition' and it
678 has been their endeavor to sell that brand, if they could, 'and failing that, Rahtjen's composition.'" The defense of laches is nominal rather than real, for the defendant's interference with the property rights of the plaintiff was, for many years, inconsiderable, and, under no decision, merits a refusal of a decree of injunction. Under all the circumstances of the case, we are not inclined to direct a decree for an accounting.

The decree of the circuit court is reversed with costs, and the case is remanded to that court with instructions to enter a decree, enjoining the defendant from selling or offering to sell paint under the name of Rahtjen's composition and from using that name upon its packages or in its advertisements as belonging to paint of its manu-

facture, in accordance with the foregoing opinion and for costs of that court.

Timothy D. Merwin and Thomas B. Kerr, for the appellant.
R. B. McMaster and William B. McAdoo, for the appellee.

679 United States Circuit Court of Appeals for the Second Circuit.

Submitted February 28, 1900; decided April 11, 1900.

RAHTJEN'S AMERICAN COMPOSITION Company, Complainant, Appellant,
vs.
HOLZAPPEL'S COMPOSITION Company, Limited, Defendant, Appellee.
No. 119, October Term, 1899.

Appeal from the circuit court of the United States for the southern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

WALLACE, *Circuit Judge:*

I dissent from the opinion of the court. I am of the opinion that the alleged trade-mark of the complainant is public property, first, because the name was the generic description of a patented article and passed to the public upon the expiration of the patent, and secondly, because the name has long ceased to denote the source of the manufacture of the article.

Rahtjen and his sons were the original manufacturers and sellers in Germany of an article which they called "Rahtjen's composition," made after a formula originated by one of them, and having properties peculiarly useful for preserving the hulls of vessels. In November, 1873, Rahtjen obtained a patent in England for the article. "Rahtjen's composition" gradually became known to the maritime world as the name of an article made according to the formula of the patent. The monopoly under the English patent expired in 1880. Thereafter the article was made and sold by manu-
680 facturers by the name of Rahtjen's composition in England and on the continent, and the name ceased to designate any particular source of manufacture. The successors of the original manufacturers, who had acquired the sole right to manufacture and sell the article in England, when they applied there for the registration of a trade-mark for the article, disclaimed the exclusive right to that name.

When they sought in 1886 to prevent manufacturers in Belgium from selling the article as Rahtjen's composition, the Belgian courts refused relief, deciding that any person who did not represent the article as purporting to be manufactured by the Rahtjens or their successors in business had a right to sell it under the name by which it had become generally known. I am at a loss to understand why

any different decision should be made in this country; but the court seems to be of opinion that the name is a good trade-mark here because no patent was ever obtained for the article in this country and because the successors in business of Rahtjen have always sold it here under the name originally applied to it. This means that a man can have a trade-mark in this country in a name which is common property everywhere else. If this is good law, then any person here buying in Belgium, or elsewhere in Europe, or in England, the article known as Rahtjen's composition, can be prevented from dealing in it here under the name by which he bought it. So long as Rahtjen and his associates and successors in business enjoyed a monopoly of the manufacture of the article the name not only identified the characteristics of the article, but also denoted the source of manufacture; but when the monopoly ceased, and the article passed into the domain of public property, the name which had been its generic designation also passed. Their monopoly has ceased to exist in this country as well as abroad, and the property in the name can no more survive here than it can abroad.

Irrespective of the effect of the expiration of the patent the designation has become *publici juris* through its long use by
681 dealers in the article which it describes, and whether this is attributable to the acquiescence of the complainant and its predecessors, or to their laches, is immaterial, since their conduct active or passive has led to the result.

One test by which to determine whether a word which was originally a trade-mark has become *publici juris* is whether the use of it by persons other than the original owner is still calculated to mislead the public and induce them to buy goods not made by the original owner upon the supposition that they are his goods. Whenever the same has come to be so generally understood by the public dealing in the article as denoting the article itself that nobody can be deceived by the use of it into the belief that it was made by any particular person, the right to it as a trade-mark is gone. Ford *v.* Foster (L. R., 7 Ch. App., 611). If that test is applied to this case there can be no doubt the name is no longer a valid trade-mark.

There is no pretense that the defendants have represented their article to be the manufacture of the complainants or of their predecessors in business.

I think the case was properly decided in the court below, and that the decree should be affirmed.

Timothy D. Merwin and Thomas B. Kerr, for the appellant.
R. B. McMaster and William B. McAdoo, for the appellee.

682 At a stated term of the United States circuit court of appeals for the second circuit, held in the court-rooms thereof, in the United States post-office building, in the city of New York, on the 23rd day of April, 1900.

Present: Hon. William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant, Appellant,
vs.
HOLZAPFEL'S COMPOSITIONS COMPANY, LTD., Defendant, Appellee.

The appeal from a decree of the circuit court of the United States for the southern district of New York made herein on the first day of December, 1899, having come on to be heard and due deliberation having been had thereon—

Now, on motion of William McAdoo, of counsel for appellee, it is—

Ordered that the decree aforesaid be, and the same hereby is, in all things reversed; and it is further—

Ordered that a mandate issue to the circuit court of the United States for the southern district of New York, directing the court to enter a decree in accordance with the prayer of the bill of complaint herein, except that no accounting for damages or profits shall be ordered, and for costs in this court and in said circuit court, all in accordance with the opinion of this court.

683 Endorsed: U. S. circuit court of appeals, second circuit Rahtjen's American Comp. Co., appellant, *vs.* Holzapfel's Compositions Co., Ltd., appellee. Decree. McAdoo & McAdoo, sol'rs for appellee, 15 Wall street, N. Y. city. Copy received Apr. 18, 1900. Tracy, Boardman & Platt. United States circuit court of appeals, second circuit. Filed Apr. 23, 1900. William Parkin, clerk.

684 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 683, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Rahtjen's American Composition Company against Holzapfel's Compositions Company, Ltd., as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 7th day of June, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

WM. PARKIN, *Clerk.*

[10-cent U. S. internal-revenue stamp, canceled.]

Endorsed on cover: File No., 17,740. Supreme Court U. S., October term, 1900. Term No., 267. Holzapfel's Compositions Company (Limited), petitioner, *vs.* Rahtjen's American Composition Company. Writ of certiorari & return. Filed June 16, 1900.

54

Supreme Court, U.S.
FILED
MAY 5 1890
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

PETITION.

JOHN G. CARLISLE,
WM. McADOO,
R. B. McMASTER,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Petition for Writ of Certiorari requiring the United States Circuit Court of Appeals for the Second Circuit to certify to the United States Supreme Court for its review and determination the case of Rahtjen's American Composition Company, Appellant, vs. Holzapfel's Compositions Company, Limited, Appellee.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petition of Holzapfel's Compositions Company, Limited, respectfully shows to this Honorable Court as follows:

I. Your petitioner is, and at the times hereinafter mentioned was, a corporation organized under the

laws of the Kingdom of Great Britain, carrying on business in the said Kingdom of Great Britain and in the City of New York, State of New York, and elsewhere.

II. That on the 11th day of August, 1898, the Rahtjen's American Composition Company, a corporation organized under the laws of the State of New York, and the respondent herein, filed its bill of complaint against said Holzapfel's Compositions Co., Ltd., your petitioner herein, for infringement of the alleged trade-mark "Rahtjen" applied to a composition or paint for ships' bottoms, and for unfair competition in trade. On the 22nd day of October, 1898, the said Rahtjan's American Composition Co., the respondent herein, filed its amended bill of complaint in said suit against Holzapfel's Compositions Company, Ltd., your petitioner, and on the 19th day of November, 1898, the answer thereto was filed, setting up that the said composition had been patented in England, and that said patent had been forfeited in 1880, and that thereby the name "Rahtjen's" by which the article had become known during the life of the patent, had become public property. It also pleaded efforts made by the predecessors in business of said Rahtjen's American Composition Co. to obtain registered trade-marks, and successful opposition made thereto by your petitioner's predecessors in business, resulting in a disclaimer filed by the predecessors in business of said Rahtjen's American Composition Co. It also set up that said predecessors of Rahtjen's American Composition Co. had not marked the vessels containing the composition with the alleged trade-mark until the predecessors of your petitioner had entered the field. It also alleged fatal laches on the part of the Rahtjen's American Composition Co. and its predecessors. It denied unfair competition. Replication to this answer was filed on the 25th day of November, 1898, and testimony and proofs were subsequently taken by both parties to said suit.

III. That the said case was heard and determined by the said Circuit Court upon the printed pleadings, proofs and exhibits of the respective parties.

IV. That the said case of your petitioner in the said Circuit Court of the United States for the Southern District of New York was heard before and decided by the Hon. HOYT H. WHEELER, District Judge of the United States for the District of Vermont, sitting in the said Court, and the opinion of the Court was delivered by him as follows :

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RAHTJEN'S AMERICAN COMPOSITION CO.	
vs.	In Equity.
HOLZAPFEL'S COMPOSITIONS LTD. CO.	

A motion to suppress a deposition for refusal of the witness to answer certain cross-interrogatories has been brought into the hearing. The refusal might have been corrected if the proceeding against it had been brought on while an opportunity to correct it could be afforded. Not having been so treated, the refusal would seem to be waived. The motion is, therefore, denied.

Rahtjen's composition appears to have become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it and not an indication of its origin as from him or under his right. The article adver-

tised for by the Government in calling for the bids which are claimed to be an infringement or unfair in competition was this product, however produced, and not the product produced by or under him. To bid for furnishing such a well-known article, by whatever name known that would describe it, would not seem to be actionable according to any established principles of law.

Let decree be entered dismissing the bill.

HOYT H. WHEELER.

V. That such proceedings were had in the said case in the said Circuit Court of the United States for the Southern District of New York, that on the 29th day of November, 1899, the said Court rendered a judgment and decree therein as follows :

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, in the second Circuit, held at the Court Rooms thereof, in the City of New York, on the 29th day of November, 1899.

Present—HON. HOYT H. WHEELER, Judge.

RAHTJEN'S AMERICAN COMPOSITION COMPANY vs. HOLZAPFEL'S COMPOSITOINS COMPANY, LIMITED.	In Equity.

This cause having come on to be heard upon the pleadings and proofs of the parties hereto, at a Stated Term of this Court, and having been argued by counsel for the respective parties hereto, and due deliberation and consideration having been had thereon ;

Now, on motion of Mc Adoo & Mc Adoo, solicitors for the defendant above named, it is

Ordered, adjudged and decreed, that the complainant's said bill of complaint be, and the same hereby is, dismissed.

And it is further ordered, adjudged and decreed, that the defendant has not violated or infringed any trade-mark or trade-name rights of the complainant.

And it is further ordered, adjudged and decreed, that "Rahtjen's Composition" has become a valuable article of commerce, well known by that name throughout the maritime world, through Rahtjen's expired English patent and his operations under it, so that his name in connection with trade in that product is descriptive of it, and not an indication of its origin as from him or under his rights.

And it is further ordered, adjudged and decreed that the defendant recover of the above-named complainant the cost of this suit, and that said defendant have execution therefor.

HOYT H. WHEELER.

Approved as to form.

TRACY, BOARDMAN & PLATT,
Complainant's Solicitors.

VI. That on the 1st day of December, 1899, the Rahtjen's American Composition Co., the complainant in said Court, and the respondent herein, was duly allowed by the said Circuit Court for the Southern District of New York an Appeal from its said decree to the United States Circuit Court of Appeals for the Second Circuit, and it was ordered by the Court that a certified transcript of the record and of all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals for the Second Circuit.

VII. That on the 5th day of December, 1899, a transcript of the record and of all proceedings of the

Circuit Court of the United States for the Southern District of New York, in the said case, was filed in the United States Circuit Court of Appeals for the Second Circuit, and the said case was entered and docketed in the said Circuit Court of Appeals, and entitled "Rahtjen's American Composition Company, complainant and appellant, vs. Holzapfel's Compositions Co., Ltd., defendant and appellee, No. 119."

The assignment of errors filed on behalf of the Rahtjen's American Composition Co., appellant in said Court, and respondent herein, was as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RAHTJEN'S AMERICAN COMPOSITION COMPANY, Complainant, vs. HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED, Defendant.	In Equity.

Assignment of Errors.

The Rahtjen's American Composition Company, complainant and appellant, makes the following assignment of errors in the above-entitled cause and in the decree entered therein:

(1) That said Circuit Court erred in that it ordered, adjudged and decreed that the "Rahtjen's Compositions" have become a valuable article of commerce well known by that name throughout the maritime world, through Rathjen's unexpired English patent and his operations under it, so that his name in connection

with trade in that produce is descriptive of it and not an indication of its origin as from or under his rights.

(2) That said Circuit Court erred in that it ordered, adjudged and decreed that the defendant has not violated or infringed any trade-mark or trade-name rights of the complainant.

(3) That the Circuit Court erred in that it ordered, adjudged and decreed that the bill of complaint be dismissed.

(4) That said Court erred in that it ordered, adjudged and decreed that the defendant should recover from the complainant the costs of the suit.

(5) That said Court erred in that it did not order, adjudge and decree that the trade-mark "Rahtjen's Composition" is a good and valid trade-mark, and that the complainant has exclusive right to use the same throughout the United States.

(6) That the said Circuit Court erred in that it did not order, adjudge and decree that the defendant has infringed said trade-mark and complainant's exclusive rights to the use of the same.

(7) That said Circuit Court erred, in that it did not order, adjudge and decree that the defendant has been guilty of unfair competition in business with the complainant.

(8) That said Circuit Court erred, in that it did not order, adjudge and decree that said defendant, its agents, servants and employees and any and all claiming and holding through or under it to be forever enjoined and restrained from infringing upon the said exclusive rights of the complainant in manner and form as prayed in said bill of complaint.

(9) That said Circuit Court erred, in that it did not order, adjudge and decree that said defendant pay to the complainant its unlawful profits and income by it derived and diverted from complainant in and by its infringing acts and unfair competition in business, and the damages sustained by the complainant by reason of said acts, together with the costs of this suit, and

that an accounting be had to assess the amount of the same.

Dated New York City, November 29, 1899.

TRACY, BOARDMAN & PLATT,
Solicitors for Complainant-Appellant,
35 Wall Street,
New York City.

VIII. The case came on to be heard in the said Circuit Court of Appeals for the Second Circuit on the 28th day of February and the 1st day of March, 1900, before the Hon. WILLIAM J. WALLACE, E. HENRY LACOMBE and NATHANIEL SHIPMAN, Circuit Judges; and on the 11th day of April, 1900, the said Court, by SHIPMAN, Judge (LACOMBE, Judge, concurring) rendered an opinion reversing the said decree of the Circuit Court of the United States for the Southern District of New York as follows:

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

RAHTJEN'S AMERICAN COMPOSITION COMPANY

vs.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED.

SHIPMAN, C. J.:

John Rahtjen invented in Germany, between the years 1860 and 1865, paints specially prepared to protect the hulls of steel and iron ships from rust, and also from becoming covered by growths animal or vegetable in character. In connection with his sons he began, in 1865, to manufacture for general use, and the paints

speedily acquired a high reputation in the maritime world under the name of Rahtjen's Composition. After his death, in 1873, the business was continued in Germany by his sons, and is now carried on by John Rahtjen and Heinrich Rahtjen under the firm name of "John Rahtjen." In 1869 the Rahtjens made Henry Gelien, of Hoboken, their exclusive agent to sell their paint in the United States, with the provision that it shall be brought on the market under the name of "Rahtjen's Composition," and with the information that no patent would be applied for in this country. Gelien issued a show card for the purpose of advertising the paint under its trade-name, copyrighted the card, advertised the paint in other ways and sold it under this trade-name, to the extent of about $17,500, until the end of 1877, when he was succeeded by Hartmann, Le Doux & Maecker. In January, 1878, Suter Hartmann & Co., of London, were appointed sole agents for the sale of the paint in this country, for whom the Hartmann firm acted as sub-agents for a time. The Suter Company was succeeded in 1888 by Suter, Hartmann & Rahtjen Composition Company, Limited, which was succeeded in 1891 by the Complainant corporation, which was organized under the laws of the State of New York. During the entire period for 1869 to the commencement of this suit, the goods were continuously advertised and sold under the name Rahtjen's Composition, and the value and commercial importance of the article which Rahtjen originated, and which, as made by his firm and their successors and sold in this country, has been distinctly and widely known. The packages which came to this country from 1869 to July, 1879, were sent from Germany and were marked "Rahtjen's Composition" or "Rahtjen's Patent Composition." From 1879 to 1883 upon each package which came to this country from the complainant's predecessors was stenciled the words Rahtjen's Com-

position in some form. Since 1883, the drums which contain the paint have been marked

"Genuine
Rahtjen's Composition
Trade (Symbol of open hand) Mark.
Hartmann's
Manufacture."

The origin of the words Hartmann's Manufacture will be stated hereafter.

The complainant's gross business in this paint in 1897 was $128,300; in 1898 was $145,200, and in the last six months of 1898 was $106,000.

The firm of John Rahtjen has continued to manufacture in Germany without patent protection. In 1871 the English firm of Suter, Hartmann & Co. was formed to sell Rahtjen's Composition in England, and became the sole agents of the firm of John Rahtjen for that purpose. All the paint was manufactured in Germany by the Rahtjens until 1874, when they built a factory in Liverpool, having obtained on November 29, 1873, an English patent for the product. They continued the manufacture in Liverpool until February, 1880, when they assigned their leasehold interest in the factory and the patent and the exclusive right to manufacture the paints for sale in Great Britain and the United States to Hartmann Brothers, who carried on the manufacture under an agreement with the Rahtjens from 1880 until Suter, Hartman & Rahtjen's Composition Co., Limited, was formed in 1888. Suter, Hartmann & Co. remained the salesman until 1888, when the corporation became both the manufacturers and the vendors. The English patent, which was apparently the only one ever taken out for the paint, was forfeited for nonpayment of dues on November 29, 1880.

During the manufacture by Hartmann Brothers, the Rahtjens were also manufacturing in Germany, and to

distinguish the English product, Hartmann Brothers marked their drums Hartmann's Manufacture, and adopted in 1883 an open hand usually colored red with the word "Composition" above and the words "Hartmann's Manufacture" below the hand as their trade-mark for all their paints, including Rahtjen's. Suter, Hartmann & Rahtjen Composition Co., Limited, obtained the same trade-mark in the United States in 1889. Hartmann, Le Doux & Maecker had obtained a United States trade-mark in 1885 for the words "Rahtjen's Composition." The complainant is the owner of the good-will and trade-mark rights of its predecessors, and is their successor in ownership thereof. The assignment of the trade-mark of 1885 by Hartmann, Le Doux & Maecker to Hartmann Brothers was not apparently acknowledged, and has not been proved by the witness to the signature. In 1883, after the Rahtjen's patent expired, three brothers, under the name of Holzapfel & Co., commenced to manufacture Rahtjen's Composition in connection with their other paints, and in 1899 became a joint stock company under the name of Holzapfel's Composition Co., Limited, which was organized under the laws of Great Britain, and is the defendant. A. C. Holzapfel, who joined them in 1887, had been from 1875 to November, 1881, an agent of Suter, Hartmann & Co., or connected with them or with a member of that firm in the sale of Rahtjen's Composition.

In 1890, the defendant or its predecessors began to send its Rahtjen's Composition and other paints to John A. Donald & Co., of New York, for sale, and in 1894, the defendant took the business and has since carried it on in this country in its own name. It manufactures and sells other paints, the leading brand being called the "International," which kind it makes special effort to sell. The business of the defendant in the United States from 1890 to 1895, including a few small invoices sent to different persons from 1883 to 1890, amounting to about 92 hundred weight, was a

fraction over 2,142 hundred weight. It has always been sold as Rahtjen's Composition, Holzapfel's manufacture and no effort has been made to conceal the fact that the defendant was the manufacturer. After the English patent expired, the successors of Rahtjen attempted to obtain an English trade-mark bearing the name of Rahtjen, but were unable to do so except upon a disclaimer of an exclusive use of the words "Rahtjen's Patent Composition for ships, bottoms, buoys, &c., or of any of such words except as a part of the combination constituting our trade-mark."

Although minor issues of fact were presented in the proofs, the facts which have been recited are those of chief importance in the case, with the exception of those bearing upon the question of laches.

The defendant's case rests mainly upon the position that, after the forfeiture in 1880 of the English patent of 1873, the name Rahtjen's Composition became generic in this country, and the article could be manufactured and sold in this country by any person who described himself as the manufacturer. Reliance is placed upon the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S., 169.

It appears that the firm of John Rahtjen introduced their paint into this country in 1869 and preferred not to attempt to obtain the protection of a patent, but to gain both reputation and protection by the character of the article, and for that purpose required that it should be sold as their product, and under a trade designation. That system has been continued by each owner of the business in this country to the present time, and the name of the inventor has become fastened upon the products. If a trade-mark exists in this country in the name of Rahtjen's Composition, the complainant is the owner of it by virtue of the right of succession, as stated in the well known case of the Lepage Co. vs. Russia Cement Co., 51 Fed. Rep., 941:

> "It is equitable that a manufacturer or dealer who has given reputation to any article should

> have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchaser, and it is also in accordance with the principles of law, and with justice to the community, that any trade-mark including a surname, may be sold with the business of the establishment to which it is incident; because, while it may be that this is ordinarily made permanent as a part of the entire organization, or as appurtenant to the locality in which the business is established, and thenceforward depends less on the individual efforts of the originator than on the combined result of all which he created."

It further appears that after 1869, the only patent which was ever taken out in any country for the paint was the English patent of 1873, which lapsed by Hartmann & Brothers' nonpayment of dues in 1880. The asserted consequence is that because the name then became *publici juris* in Great Britain it became public property everywhere. There was in 1880 a valid trade-mark right in the United States which Rahtjens and their successors had acquired. The lapse of the English patent neither broke this trade-mark, nor interfered with the title of its owners. They owned it, and although the lapse of the English patent interfered very seriously with their title to exclusive rights in Great Britain, it was ineffectual upon title in another country. In England the Rahtjens undertook to acquire exclusive rights by virtue of the patent laws. In the United States they had previously acquired exclusive rights by the common law. Their failure in England does not cause a cessation of their common law rights in the United States. The lapse of the English patent could not cause a lapse of trade-mark rights throughout the world.

The Singer case, *supra*, had exclusive reference to the continuance of a monopoly in this country upon

which letters patent of this country had expired, and the court held that the right to use the name passed to the public in this country, with the expiration of the exclusive right created by the patent to make and sell the article. The decision followed the previous general course of decisions in the Courts of this country and elsewhere, but it did not relate to the facts of this case, as obviously appears, in the opinion of Mr. Justice WHITE, who spoke for the court. In the Scotch and English and French sewing machine cases for an injunction against the use of the name of the maker, wherein the injunction had been granted such machines had not been patented in those countries. In the French case of Howe, H., where the French courts enjoined the use of that name on a sewing machine, the court as a basis of its decree, used the following language: "And whereas, they (Howe and his heirs) did not take patents in France for the invention and their improvements, which have, therefore, fallen into the public domain, and have never, either expressly or tacitly, abandoned the right to affix his name (that of Howe) to the products of the invention" (Singer case, *supra*, pp. 195, 196, 199). It is a matter of common knowledge that Howe took out patents upon his machine and its improvements in this country.

Attention is called by the defendant to two continental decisions—one of the Brussels Court of Appeals, and the other of the Criminal Chamber of the "Land" Court at Hamburg—in cases respecting the exclusive right of the Rahtjens to the trade-mark. The Brussels decision was based upon the fact, as found, that in Belgium the name indicated an article, and not the maker. The attempt is made in this case to show that in the public mind in this country the name of Rahtjen's Composition is a descriptive name, which is understood to designate a thing, and not its origin—as, for example, the word "Hansom," when applied to a cab, now means simply a particular style of vehicle.

We are not able to find from the record, as a fact, that in the United States the name Rahtjen's Composition has become a generic name, and now means a compo ition made by any one after the original formula of Rahtjen. A few witnesses say that they supposed that the complainant and the defendant were competitors in the manufacture of an article called by the same name, but the testimony does not show that the fact exists in this country, which was found by the Brussels Court of Appeals, that, " in the eyes of the public, this name of Rahtjen has become a sort of qualifying adjective, indicative of his special produce."

The Hamburg case was a criminal one, founded upon a criminal statute, and the representatives of Holzapfel were not found to have committed the offense which was defined by the existing statute, and which was, in substance, having knowingly made untrue statements of fact.

The defendant next insists that the complainat's laches should prevent any decree in its favor. It is true that the defendant has sold its manufacture of Rahtjen's Composition to a certain extent since 1890, but the sales have been comparatively small, and did not interfere with the complainant's business to any marked extent until the defendant obtained a contract with the Naval Department of the U. S. Governmentin answer to a call for offers of " Rahtjen's Composition," when suit was promptly commenced. The defendant's chief brand of paint is the " International Composition " and it has been their endeavor to sell that brand, if they could, and, failing that, Rahtjen's Composition. The defense of laches is nominal rather than real, for the defendant's interference with the property rights of the plaintiff was, for many years, inconsiderable, and, under no decision, merits a refusal of a decree of injunction.

Under all the circumstances of the case, we are not inclined to direct a decree for an accounting.

The decree of the Circuit Court is reversed with

costs, and the case is remanded to that Court with instructions to enter a decree, enjoining the defendant from selling or offering to sell paint under the name of Rahtjen's Composition, and from using that name upon its packages or in its advertisements as belonging to paint of its manufacture, in accordance with the foregoing opinion, and for costs of that Court.

WALLACE, Circuit Judge, delivered a dissenting opinion as follows:

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

RAHTJEN'S AMERICAN COMPOSITION COMPANY

vs.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED.

WALLACE, Circuit Judge:

I dissent from the opinion of the Court. I am of the opinion that the alleged trade-mark of the complainant is public property, first, because the name was the generic description of a patented article and passed to the public upon the expiration of the patent, and, secondly, because the name has long ceased to denote the source of the manufacture of the article.

Rahtjen and his sons were the original manufacturers and sellers in Germany of an article which they called "Rahtjen's Composition," made after a formula originated by one of them, and having properties peculiarly useful for preserving the hulls of vessels. In November, 1873, Rahtjen obtained a patent in England for the article. "Rahtjen's Composition" gradually became known to the maritime world as the name of an

article made according to the formula of the patent. The monopoly under the English patent expired in 1880. Thereafter the article was made and sold by manufacturers by the name of Rahtjen's Composition in England and on the continent, and the name ceased to designate any particular source of manufacture. The successors of the original manufacturers, who had acquired the sole right to manufacture and sell the article in England, when they applied there for the registration of a trade-mark for the article, disclaimed the exclusive right to that name.

When they sought, in 1886, to prevent manufacturers in Belgium from selling the article as Rahtjen's Composition, the Belgian courts refused relief, deciding that any person who did not represent the article as purporting to be manufactured by the Rahtjens or their successors in business had a right to sell it under the name by which it had become generally known. I am at a loss to understand why any different decision should be made in this country, but the court seems to be of opinion that the name is a good trade-mark here, because no patent was ever obtained for the article in this country, and because the successors in business of Rahtjen have always sold it here under the name originally applied to it. This means that a man can have a trade-mark in this country in a name which is common property everywhere else. If this is good law, then any person here buying in Belgium, or elsewhere in Europe, or in England, the article known as Rahtjen's Composition, can be prevented from dealing in it here under the name by which he bought it. So long as Rahtjen and his associates and successors in business enjoyed a monopoly of the manufacture of the article, the name not only identified the characteristics of the article, but also denoted the source of manufacture; but when the monopoly ceased, and the article passed into the domain of public property, the name which had been its generic designation also passed. Their monopoly has ceased to exist in

this country as well as abroad, and the property in the name can no more survive here than it can abroad.

Irrespective of the effect of the expiration of the patent, the designation has become *publici juris* through its long use by dealers in the article which it describes, and whether this is attributable to the acquiescence of the complainant and its predecessors, or to their laches, is immaterial, since their conduct, active or passive, has led to the result.

One test by which to determine whether a word which was originally a trade-mark has become *publici juris* is whether the use of it by persons other than the original owner is still calculated to mislead the public and induce them to buy goods not made by the original owner upon the supposition that they are his goods. Whenever the name has come to be so generally understood by the public dealing in the article as denoting the article itself that nobody can be deceived by the use of it into the belief that it was made by any particular person, the right to it as a trade-mark is gone (Ford vs. Foster, L. R., 7 Ch. App., 611). If that test is applied to this case, there can be no doubt the name is no longer a valid trade-mark.

There is no pretense that the defendants have represented their article to be the manufacture of the complainants, or of their predecessors in business.

I think the case was properly decided in the court below, and that the decree should be affirmed.

IX. On the 23rd day of April, 1900, the said Circuit Court of Appeals made and entered an order for a mandate, as follows:

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, held in the Court Rooms thereof in the United States Post Office Building, in the City of New York, on the 23rd day of April, 1900.

Present—

HON. WILLIAM J. WALLACE,
E. HENRY LACOMBE,
NATHANIEL SHIPMAN,
Circuit Judges.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Complainant-Appellant,

vs.

HOLZAPFEL'S COMPOSITIONS COMPANY, LTD.,
Defendant-Appellee.

The appeal from a decree of the Circuit Court of the United States for the Southern District of New York, made herein on the first day of December, 1899, having come on to be heard and due deliberation having been had thereon :

Now, on motion of William McAdoo, of counsel for appellee, it is

Ordered, that the decree aforesaid be, and the same hereby is, in all things reversed ; and it is further

Ordered, that a mandate issue to the Circuit Court of the United States for the Southern District of New York, directing the Court to enter a decree in accordance with the prayer of the bill of complaint herein, except that no accounting for damages or profits shall be ordered, and for costs in this Court and in said

Circuit Court, all in accordance with the opinion of this Court.

N. S.

E. H. L.

X. A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this honorable court, relative to cases from Circuit Court of Appeals, and the same is marked "Exhibit A."

XI. Your petitioner is advised and believes that the said judgment and decree of the said United States Circuit Court of Appeals for the Second Circuit, in the said case is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth section of the Act of Congress entitled "An Act to establish Circuit Court of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891.

XII. The said case was decided in the said United States Circuit Court of Appeals for the Second Circuit, upon the supposed recognition of the said doctrine by this honorable court, in the case of The Singer Mfg. Co. v. June Mfg. Co., 163 U. S., 169, but the question presented by and involved in the said case of the petitioner was not presented by or involved in the case of The Singer Mfg. Co. v. June Mfg. Co., and the question was not decided in that case, nor was the decision of the same necessary for the determination of that case by this honorable court.

XIII. That the question whether a common law trademark in the name of an article, is or is not affected in this country by the expiration or lapse of a foreign

patent on said article, has never been judicially determined by any court, prior to the said suit against your petitioner.

XIV. The importance and gravity of this case to your petitioner will be recognized from the fact that through the decree of the United States Circuit Court of Appeals your petitioner will be forever enjoined from using the word "Rahtjen," thereby ending an established business which your petitioner has built up through very many years.

Your petitioner claims:

FIRST. That when a name under which an article has become known in the country in which it was patented, becomes public property there, by reason of the expiration of the patent, it becomes public property the world over (except in such countries where there may be valid, existing patents, on said article, unaffected by the term of the foreign patent).

SECOND. That, under the circumstances stated in the foregoing claim, the right to manufacture the article, and sell it as being made in accordance with the expired patent, has become public property and open to the entire world.

THIRD. That if the respondent ever acquired a common law trade-mark in the United States, such trade-mark became public property when the English patent expired.

FOURTH. That the respondent cannot have a common law trade-mark in the United States in a name which has become public property abroad.

FIFTH. That the name "Rahtjen's Composition" has become the generic description of a patented arti-

cle and passed to the public on the expiration of the patent.

SIXTH. That the name "Rahtjen's Composition" has long ceased to denote the source of manufacture.

SEVENTH. That the respondent, having stood silently by for very many years and allowed the petitioner's predecessors to build up an established business in "Rahtjen's Composition," and the business having been subsequently incorporated with a large capital and numerous new stockholders, is forever estopped from enjoining or interfering with the petitioner's use of the word "Rahtjen's."

EIGHTH. That the sale by the predecessors in business of the Rahtjen's American Composition Company was not large enough, or conducted for a long enough period in the United States, for the said company to have acquired a common-law trade-mark in the United States prior to the application for the English Patent.

NINTH. That the act of the predecessors of the respondent in disclaiming the exclusive use of the word "Rahtjen" when they applied for the registration of a trade-mark in England estops them from claiming such exclusive right now in this country.

Wherefore, your Petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case entitled "Rahtjen's American Composition Co., complainant and appellant, vs. Holzapfel's Compositions Company, Limited, Defendant and Appellee, No. 119," to the end

that the said cause may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said act, and that the said judgment and decree of the said Circuit Court of Appeals for the Second Circuit, in the said case, awarding an injunction and costs, may be reversed by this honorable court.

And your petitioner will ever pray, &c.

Holy apple Compositions Company Limited
John A Lendld
manager

William Mc Adoo
Solicitor and Counsel Petitioner.

We certify that in our opinion the above petition is well grounded in matter of law and proper to be heard.

John G Carlisle

William Mc Adoo.
Of Counsel for Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN A. DONALD, being duly sworn, says that he is an officer, to wit: the manager in the United States of the Holzapfel's Compositions Company, Limited, the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

Sworn to and subscribed before me this 3rd day of May, 1900. } John A Donald

Robert L. Maroney
Notary Public
113
N.Y. Co.

{Notarial Seal}

No. 628.

Brf. of Carlisle for Petitioner.

Office Supreme Court U.S.
FILED
MAY 14 1900
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

Filed May 14, 1900.

OCTOBER TERM, 1899.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

BRIEF FOR PETITIONER.

JOHN G. CARLISLE,
WM. McADOO,
R. B. McMASTER,
Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, New York.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Brief for Petitioner.

This is a petition for a writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination the case of Rahtjen's American Composition Company, appellant, vs. Holzapfel's Compositions Company, Limited, appellee.

The said suit was brought for an accounting and an injunction to restrain the defendant (the petitioner), an English corporation, from using in this country the name "Rahtjen" on a composition or paint made by it in accordance with the formula contained in the expired English patent to Rahtjen. The bill was dismissed at Circuit. On appeal the Circuit Court of Appeals by a divided court, reversed the decision, awarding an injunction, but no accounting.

I.

THE QUESTION RAISED ON THE THRESHOLD OF THE CASE IS WHETHER A PARTY CAN OWN A TRADE-MARK HERE, WHEN HE HAS LOST THAT SAME TRADE-MARK IN A FOREIGN COUNTRY BY THE EXPIRATION OF A PATENT OF THAT COUNTRY, OWNED BY HIM ON THE ARTICLE.

This question, so far as the reported decisions go, is a novel one. Prior to this suit, the line of decisions in this country relate only to the effect of the expiration of a United States Patent on a trade-mark used here. The law has become well settled on that point, and it has been uniformly held by our Courts that the name given to the article during the life of the patent becomes public property when the patent expires.

It was so held in the case of the "Singer Sewing Machine."

Singer Mfg. Co. vs. June Mfg. Co., 163 U. S., 169.
Singer Mfg. Co. vs. Riley, 11 Fed. Rep., 706.
Singer Mfg. Co. vs. Stanage, 6 Fed. Rep., 279.
Singer Mfg. Co. vs. Larsen, 8 Biss., 151.

And in the case of "Yale Locks."

Ex parte Yale & Towne Mfg. Co., 81 Pat. Off. Gaz., 801.

And in the case of "Fairbank's Scales."

Fairbanks vs. Jacobus, 14 Blatchf., 337.

And in the case of "Goodyear Rubber."

Goodyear India Rubber Glove Mfg. Co. vs. Goodyear Rubber Co., 128 U. S., 598.
Goodyear Rubber Co. vs. Day, 22 Fed. Rep., 44.

And in the case of "Leclanche" batteries.

Leclanche Battery Co. vs. Western Electric Co., 21 Fed. Rep., 538; 23 Fed. Rep., 276.

And in the "Castoria" cases.

Centaur Co. vs. Heinfurter, 84 Fed. Rep., 955.

Centaur Co. vs. Killenberger, 87 Fed. Rep., 725.

Centaur Co. vs. Neathery, 91 Fed. Rep., 891.

Centaur Co. vs. Marshall, 92 Fed. Rep., 605.

But the text books and Federal and State decisions may be searched in vain for any discussion or statement of the effect of the expiration of a foreign patent on a trade mark used here (as well as abroad) by the owner of the said expired patent.

The present case raises this question, and it is of great importance to the commercial community at large what the rule to be established by this Court shall be.

The petitioner contends that where a name under which an article has become known in the country in which it was patented becomes public property there, by reason of the expiration of the patent, it becomes public property the world over (except in countries where there may be valid existing patents on said article, unaffected by the term of the foreign patent, which is not the present case).

In this case the article was patented in England in 1873, and the said patent was forfeited in 1880 for non-payment of taxes. During the life of that patent the paint was known as "Rahtjen's Composition" in England and throughout the maritime world. Bottom paint of this description, to be successful, must acquire a wide reputation and have more than a local standing. The ship that paints with it in New York may dock again at Liverpool or Bremen or Genoa or Hong Kong or Melbourne or Rio de Janeiro. A composition like this, therefore, lives its life in the whole maritime world. Rahtjen's paint went around the earth and became known as a patented composition during the life of the English Patent. When the patent expired the generic appellation became *publici juris*, not only in

England but everywhere. Thereafter, the name ("Rahtjen") could never again be appropriated exclusively as a trade-mark even by the inventor or patentee himself. When the invention fell into the public domain it entered with the name which the inventor had given it. If the patentee or his representatives desire to continue the manufacture of the article after the expiration of the patent and desire to protect his or their reputation as manufacturers thereof, he or they must adopt a new and arbitrary trade-mark, and build up the rights of ownership therein exactly as if a stranger.

This contention, while opposed to the opinion rendered herein by Judge SHIPMAN, is supported as follows:

1. By the dissenting opinion of Judge WALLACE, in the Circuit Court of Appeals.
2. By the opinion of Judge WHEELER, sitting at Circuit.
3. By the decision of the Belgian Court of Appeals.
4. By the decision of the Criminal Court in Hamburg.

We shall take these decisions up in the following order:

The Belgian Decision. From the facts stated in this decision, it appears that in 1885 Rahtjen and Suter, Hartman & Co. (the predecessors of Rahtjen's American Composition Co.), brought suit in Belgium against W. Wright, the agent of the London Oil and Colour Co., for putting on the sign of his house the inscription, "Manufacturers of Rahtjen's Composition," and for announcing that he sold "Original Rahtjen's Compositions for Ships' Bottoms, manufactured by the London Oil and Colour Co., Limited." It appeared that Rahtjen, the inventor of the paint and the predecessor of the complainants, had patented the article in England, in 1873, and that this patent was forfeited in 1880. During its life, however, the article

had become known in the maritime world under the generic name, "Rahtjen's Composition." On the expiration of the patent in England, the London Oil & Colour Co., Limited, made the paint in England and shipped it to the defendant to be sold in Belgium under the name "Rahtjen's Composition." The complainants then commenced this action to restrain the unlawful use of the word "Rahtjen." The Brussels Court of Appeals, in reversing a judgment in favor of the complainants, held: (1) That when the English Patent expired any person could make the product in England, calling it Rahtjen's Composition, and that the product so made could be shipped to Belgium and sold there; (2) That any person who could make the article in England and sell it in Belgium could call it in Belgium by the name it had acquired during the life of the English Patent.

Cert. Copy Record, pp. 560–566.

The German decision. From the statement of facts in this decision it appears that in 1897 John Rahtjen instituted criminal proceedings in Hamburg, Germany, against Max Holzapfel and his Hamburg agents, Joost & Schultz, for marking the composition and also the announcements, price-lists, business letters, &c., with the name of "Rahtjen." The facts in the case are very fully stated in the opinion, wherein the fact that Rahtjen was the inventor of the composition, and had sold it for a considerable period under his own name; that on November 29, 1873, he obtained a patent in England for the paint under the title "Preservative Composition for Ships' Bottoms, &c.," but that, owing to failure to pay the tax under the English Patent Law, the patent lapsed, as fully recited, and the Court said, "The manufacture of the paint in accordance with the patent therefore became public property."

The substance of the decision is that the words "Rahtjen's Patent" composition conveys to any in-

terested party no other meaning than that the composition recommended was manufactured in accordance with Rahtjen's Patent. That it could possibly be a preparation of Rahtjen himself, this form of expression was not likely to suggest to any person belonging to the class among whom such goods are sold. The assumption that the goods recommended were supplied from Johann Rahtjen's works was further refuted by the fact that the Holzapfel's Company expressly called itself "Manufacturers of Genuine Rahtjen's Patent Paint," and added, "Warranted made according to Rahtjen's original specification." This addition removed any doubt as to the goods offered not being Rahtjen's manufacture. Besides, this addition was conformable to the truth. The witness Rahtjen himself admitted that the defendant Max Holzapfel doubtless manufactured the paint according to the original patented receipt of his (Rahtjen's) father, which he had found in the specification. Besides, the defendant Max Holzapfel had been most energetic to remove any doubt as to his company being the manufacturer of "Rahtjen's Patent" composition, for he actually referred to their own trade-mark and recommended customers to specially ask for "Holzapfel's" manufacture. Where, therefore, the name of "Rahjen" was so used the possibility of that portion of the public which might be desirous of purchasing goods of this kind being misled as to the origin of the goods was out of the question.

Cert. Copy Record, pp. 571–588.

Judge Wallace's opinion. Judge WALLACE says: "I "am of the opinion that the alleged trade-mark of the "complainant is public property—first, because the "name was the generic description of a *patented* article, "and passed to the public upon the *expiration of the* "*patent.*" He then recites the facts in the present case, and, after dwelling on the Belgian decision, says: "I am at a loss to understand why any different de-

"cision should be made in this country, but the Court "seems to be of opinion that the name is a good "trade-mark here, because no patent was ever ob- "tained for the article in this country, and because "the successors in business of Rahtjen have always "sold it here under the name originally applied to it. "This means that a man can have a trade-mark in "this country in a name which is common prop- "erty everywhere else. If this is good law, then "any person here buying in Belgium, or elsewhere "in Europe, or in England, the article known as "Rahtjen's composition, can be prevented from dealing "in it here under the name by which he bought it. "So long as Rahtjen and his associates and successors "in business enjoyed a monopoly of the manufacture "of the article, the name not only identified the char- "acteristics of the article, but also denoted the source "of manufacture; butwhen the monopoly ceased, and "the article passed into the domain of public prop- "erty, the name which had been its generic designa- "tion also passed. Their monopoly has ceased to ex- "ist in this country as well as abroad, and *the prop- "erty in the name can no more survive here than it can "abroad.*"

See Petition pp. 16 18.

Judge Wheeler's Decision. Judge WHEELER sitting at circuit, in dismissing the bill, said: "Rahtjen's com- "position appears to have become a valuable article of "commerce, well known by that name throughout the "maritime world, through Rahtjen's expired English "patent and his operations under it, so that his name "in connection with trade in that product is descrip- "tive of it and not an indication of its origin as from "him or under his right. The article advertised for by "the Government in calling for the bids which are "claimed to be an infringement or unfair in competi- "tion was this product, however produced, and not the "product produced by or under him. To bid for fur-

" nishing such a well-known article, by whatever name " known that would describe it, would not seem to be " actionable according to any established principles of " law."

Cert. Copy Record, p. 657.

The respondent surely cannot have a trade-mark in this country in a name which is common property everywhere else.

Nor does the Scotch case of Singer Mfg. Co. vs. Kimball, referred to in Judge WHITE'S opinion in Singer Mfg. Co. vs. June Mfg. Co., conflict with the doctrine laid down in the Belgian and German cases, and the opinions of Judges WALLACE and WHEELER, above referred to. That Scotch case which supported the alleged trade-mark in the word "Singer" for a sewing machine did so under the belief that the Singer machine was never patented anywhere, and that there was no generic principle which might be termed the Singer principle shown in those machines.

We quote from the Lord President's opinion in said Scotch case:

" Now, it appears to me that for a series of years, " and certainly, I think, back to the year 1863, as " averred in the petition, everybody in the trade has " understood that a Singer Machine or a Singer Sew- " ing Machine is a sewing Machine manufactured by " the Singer Manufacturing Company. I think that is " the fair result of the evidence. It has hardly been " denied that for that period the fact has been so. But " then reference is made to an earlier period in the " history of the use of this word, as showing that the " meaning thus acquired by the word Singer arose " from false representation made by Mr. Singer and " afterwards by the Singer Manufacturing Company, " or some other Company that preceded them, as to " the right of Mr. Singer, as having a patent or " patents, which enabled him, for a time at least, ex- " clusively to manufacture what was called the Singer

" Machine. Now, no doubt Mr. Isaac Singer, who " appears to be still a partner of this Company, so far " back as 1852, was under the impression that he had " made an original invention, and he expected to obtain " a patent for it, but in that he was disappointed. It " turned out that the straight needle with the vertical " action, which he conceived to be a novelty invented " by himself, had been anticipated in other Sewing " Machines, and the consequence was that he did not " obtain a patent for that.

" But I am not prepared to say that there is any " evidence in this case to show that either Mr. Singer " or any person associated with him in business com- " mitted any fraud in the way of holding out to the " public that they held patents which they did not " hold. I do not think there is sufficient evidence of " that, or that the use of the word Singer, as applic- " able to machines made by him and his company, was " caused by their false representations of patent rights " belonging to him. On the contrary, it rather ap- " pears to me the use of the name grew up and ma- " tured just in consequence of Mr. Singer and those " connected with him in business having constantly " gone on making this kind of machine which he " thought originally was a novelty, and improving it in " every kind of way that occurred to them in the " progress of their business. It was in that way, I ap- " prehend, that the name ' Singer ' came to have what " is now its established meaning, and I cannot see that " there is anything in the history of that appropriation " of the name to prevent the Singer Manufacturing " Company now from asserting right to it as their " trade-mark. It is said, no doubt, on the part of the " defendant, that to interdict him and all other manu- " facturers of sewing machines from the use of this " name involves a great hardship, *because they cannot* " *otherwise describe what they are perfectly entitled to* " *make in their business, machines upon the Singer prin-* " *ciple.* Now, that statement at first sight is very

" plausible, but it seems to me to rest upon a fallacy. " *It assumes that there is* what is called a Singer prin- " ciple—that is to say, that there are some peculiar- " ities in the machines made by the Singer Manufact- " uring Company that are not to be found in any " other machines, or some combination of these " peculiarities that is not to be found in other ma- " chines, and it would be very desirable to ascertain " precisely what that is before disposing of the argu- " ment founded upon these assumptions. But I con- " fess I have looked in vain in the proof for anything " like a definite or intelligible explanation of what is " meant by the Singer principle."

1873, Singer Mfg. Co. vs. Kimball, 11 Cases Ct. of Session, 3 Series, p. 267 (272-3).

The respondent (or appellant in the Court below) contends that its predecessors acquired a common-law trade-mark in this country before making the application for the English Patent.

We know of no rule of law laid down in the text books or in the decisions in this country on this point. We believe the question so raised to be a novel one.

It is true that in the case of Centaur vs. Heinsfurter it would seem that the point was raised by the pleadings whether a man having acquired a common law trade-mark prior to the grant of a patent on the article, could not still retain his trade-mark rights after the expiration of a patent. From the statement of facts printed at the head of the case it would appear that, *prior to 1868*, one Pitcher, the predecessor of the complainant *invented* a medicinal compound *and sold* it under the name of "Castoria." *In 1868* he obtained a patent on the formula. After the patent expired the defendant manufactured the article in accordance with the formula, and sold it as "Castoria." The complainant filed a bill asking that the defendant be enjoined from selling its goods under the name of "Castoria." The Court ignored the point raised by

the allegation of the acquisition of a common-law trade-mark prior to the grant of a patent, and decided that when the patent expired the right to make the article and to sell it as "Castoria" was open to the world (Centaur Co. vs. Heinsfurter, 84 Fed. Rep., 955).

The respondent, in their brief below, cited Batcheller vs. Thomson, 93 Fed. Rep., 660, as supporting its contention that, if its predecessors used said trade-mark two and one-half years prior to obtaining the patent, the subsequent expiration of the patent would not affect the trade-mark rights. That case, however, we submit, does not bear out that contention. The facts of that case are stated by the Court in its opinion: "When Thomson commenced, in Paris and in England, "the manufacture of corsets, they were made in ac- "cordance with an alleged invention of Edward "Drucker. Letters Patent of the United States for "this Corset were issued in the name of Drucker on "May 7, 1867, but the corsets made accordingly were "unsatisfactory; the alleged invention was concededly "of no value, ceased to be used, and an improvement "was made in England by an employee of Thomson, "which was patented in the United States on Novem- "ber 30, 1869, to Henry A. Lyman, assignor to "Thomson, Langdon & Co. This patent expired "November 30, 1886. How closely the corsets of "complainant or defendant followed this improvement "did not appear, and, indeed, the distinctive value "which the improvement imparted to the product did "not appear" (see middle p. 663). * * * "The "Thomson corset was extensively advertised, and was "a favorite, but whether its value was connected with "the Lyman Patent is unknown" (p. 665). These facts are very different from those of the case under consideration, where we have an article of intrinsic merit, made under a patented formula, and deriving its value from the formula, and not from the name.

II.

THE NAME RAHTJEN'S COMPOSITION HAS LONG CEASED TO DENOTE THE SOURCE OF MANUFACTURE, AND BECOME THE GENERIC DESCRIPTION OF THE ARTICLE.

The testimony in this case, of disinterested witnesses, familiar with maritime matters, is to the effect that the maritime world understood Rahtjen's Composition to be a kind of paint, and not as of any particular source (see testimony of Schnitzer, Record, p. 465, Q. 67; Nicholl, Record, p. 492, Q. 11 ; Howden, Record, p. 540, Q. 10 ; Stephens, Record, p. 550, Q. 11).

It was also held in the Belgian decision, and in the German decision, that the name " Rahtjen " had long ceased to denote the source of manufacture.

There are two exhibits in this case to which particular attention is called, as showing that both the English and the United States Governments, respectively, in calling for supplies of Rathjen's composition, recognized it not only as a generic thing, but as having a widely known common formula, by whomsoever manufactured. These exhibits to which we refer, are the letter from the Royal India Office (p. 651) and the U. S. Government proposal for bids (p. 29). As said by Judge WHEELER in the Court below : " The article advertised for by the Government in calling for the bids which are claimed to be an infringement or unfair in competition was this product, however produced, and not the product produced by or under him " (Rahtjen).

This paint then has become generically known as " Rahtjen's "—the name has become part as it were of the thing itself. The public knows it as " Rathjens." It is a generic designation, and has no reference to the source of manufacture, as is shown by the action of the respondent in this case printing and painting on and about its goods the words " Hartman's Manu-

facture" (see p. 82), thus unqualifiedly recognizing that there were different manufactures and sources of the generic thing known as "Rahtjen's Composition."

III.

THE ACT OF THE PREDECESSORS OF THE RESPONDENT IN DISCLAIMING THE EXCLUSIVE USE OF THE WORD "RAHTJEN" WHEN THEY APPLIED FOR THE REGISTRATION OF A TRADE-MARK IN ENGLAND ESTOPS RESPONDENT FROM CLAIMING SUCH EXCLUSIVE RIGHT NOW IN THIS COUNTRY.

Bearing in mind the forfeiture of the English Patent for Rahtjen's Composition in 1880, and the fact that the name Rahtjen's Composition had become public property, we now call attention to the following efforts made by the respondent's predecessors to secure a trade-mark in England:

(1) On June 25, 1883, John Rahtjen filed an application for registration of the words "Genuine Rahtjen's Composition for Ships' Bottoms, &c." ("Defendant's Exhibit Cert. Copy Record of Application, [illegible]position and Withdrawal or John Rahtjen, No. 32,826 of 1883," Printed pp. 627–630). This was after the English Patent to Rahtjen had been forfeited and after the defendant's predecessors had commenced to make and sell (May, 1883) Rahtjen's Composition, Holzapfel's manufacture. M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 629). Rahtjen filed no counter statement, and his application was held to be withdrawn and abandoned (p. 630).

(2) On July 7, 1883, John Rahtjen filed an application for registration of the words "Rahtjen's Composition"

("Defendant's Exhibit Cert. Copy Record of the Application, Opposition and Withdrawal of John Rahtjen, No. 32,952 of 1883," Printed, pp. 623–626). This was after said English Patent had been forfeited and after the defendant's predecessors had commenced to make and sell "Rahtjen's Composition, Holzapfel's manufacture." M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 625). Rahtjen filed no counter statement, and his application was held to be withdrawn and abandoned (p. 626).

(3) On June 28, 1883, Suter, Hartmann & Co. filed an application for registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. None Genuine without this signature. Suter, Hartmann & Co." ("Defts.' Exhibit Cert. Copy Application, Opposition and Withdrawal of Suter, Hartmann & Co., No. 32,858 of 1883," Printed pp. 631–635). This was after the English Patent to Rahtjen had been forfeited, and after the defendant's predecessor had commenced to make and sell "Rahtjen's composition, Holzapfel's manufacture." M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 633). Suter, Hartmann & Co. filed no counter statement, and their application was held to be withdrawn and abandoned (p. 634).

(4) On January 9, 1884, Suter, Hartmann & Co. filed an application for registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. Directions. Suter, Hartmann & Co." ("Defendant's Exhibit Cert. Copy Suter, Hartmann & Co.'s Application for Trade-mark 34,919 of 1884," Printed pp. 636–638); and in their application appears this DISCLAIMER: "*We do not claim the exclusive use of the words 'Rahtjen's Patent Composition for Ships' Bottoms, Buoys, etc. Directions,' or any of such words, except as part of the combination constituting our trade-mark, as represented annexed, and to which we claim exclusive right.*"

This is a full disclaimer of any exclusive right to the words Rahtjen's Patent Composition, or any of those words, except when accompanied by all of the other words above quoted, and your petitioner has never used said combination of words.

Where the plaintiff has disclaimed the exclusive use of W. R. as a trade-mark to be stamped on goods, *held*, that he cannot restrain the defendant from using the letters W. R. on the same class of goods.

(1892) Rosenthal vs. Reynolds, 61 L. J., Ch., 508.

So, when the applicant for registration of a trade-mark restricted himself in his application to a *red anchor*, the Court refused to recognize his claim to the unlimited use of the anchor emblem. The Court said: "He thereby gave public notice to all traders and others in the United States that he adopted as his trade-mark for medical compounds, not the representation of an anchor generally, but a red anchor in a white oval space or field. This limited registration was a very deliberate act of the plaintiff, and he must abide the consequences. It would be a perversion of the right of registration under the Act of Congress, of which the plaintiff availed himself, and would amount to a fraud on other traders to permit the plaintiff now to *assert broader rights* in the anchor as a trade-mark symbol than his public registration in 1885 disclosed."

(1892) Richter vs. The Anchor Remedy Co., 52 Fed., 455.

IV.

THE RESPONDENT, HAVING STOOD SILENTLY BY FOR VERY MANY YEARS AND ALLOWED THE PETITIONER'S PREDECESSORS TO BUILD UP AN ESTABLISHED BUSINESS IN "RAHTJEN'S COMPOSITION," AND THE BUSINESS HAVING BEEN SUBSEQUENTLY INCORPORATED WITH A LARGE CAPITAL AND NUMEROUS NEW STOCKHOLDERS, IS FOREVER ESTOPPED FROM ENJOINING OR INTERFERING WITH THE PETITIONER'S USE OF THE WORD "RAHTJEN'S."

The respondent and its predecessors in business have known for the past sixteen years that the petitioner and its predecessors in business were making and selling openly and notoriously a composition for ships' bottoms under a name of which the word "Rahtjen" formed part. This was well known to the founders and directors of the English or parent company, from whom the respondent company derives its rights (if any), and who are also directors and owners of the majority of the capital stock in the respondent company.

Your petitioner and its predecessors have continuously, since 1883, advertised its Rahtjen's Composition extensively, and have spent from £1,500 to £1,800 for such purpose annually (p. 424, Q. 69), and built up an active competition with the respondent and its predecessors, and finally outstripped them. The testimony is undisputed that your petitioner's business in these composition paints for ships' bottoms is to-day larger than that of any other company of the like nature in the world (p. 439, Q. 156, x-Q. 157; p. 519, Q. 63; p. 521, x-Qs. 68, 69).

Thus, from 1883 to the present time, your petitioner or its predecessors, acting in good faith and on what we submit was its legal rights, has been continuously, openly and notoriously supplying quantities of Holzapfel's Rahtjen's Composition in England, in Europe

and abroad, and in the United States. During that time its business in these paints has grown until now it is the largest one of its kind in the world. During that time from a partnership it has grown into a large and wealthy corporation, with many new parties in this country and abroad interested therein as stockholders, and the value of its property, of which the paint in question forms part, has, owing to its exertions and expenditure of money in advertising and pushing the same, immensely increased. During all this period of 16 years the respondent and its predecessors, with full knowledge of the facts, stood silently by without any assertion of its alleged rights and without even a notice or protest to the defendant.

JOHN RAHTJEN admits that he was aware, at the time he applied for a registration of this alleged trade-mark in England, in 1883 (which application was successfully opposed by petitioner's predecessors), that petitioner's predecessors were then using on their paint the alleged trade-mark or trade-name in question (p. 225, x-Qs. 401–404), and that petitioner's predecessors, and defendants, have since continued to do so.

WILLIAM HARTMANN, of Suter, Hartmann & Co., (predecessors of complainant), also knew of such use. He says he knew of it soon after Holzapfel & Co. had commenced business (p. 109, fol. 325). He was shown the circular of M. Holzapfel & Co., dated April 17th, 1883 (Defendant's Exhibit, Holzapfel & Co.'s Circulars, Advertisements, Letter Heads, &c.), in which Holzapfel & Co. announce that they are making and selling a Rahtjen composition, according to the specification of the Rathjen Patent, and he says he saw that notice about the time it bears date—to wit, April 17, 1883 (p. 129, x-Qs. 288, 289). Moreover, it is a matter of record that the 1883 application of his firm of Suter, Hartmann & Co., for registrations of said alleged trade-mark, was successfully opposed and defeated by Holzapfel & Co., your petitioner's predecessors.

Suter, Hartmann & Co., were afterwards ... ed into the Suter, Hartmann and Rahtjen's Composition Company. This Company is largely interested in the Rahtjen's American Composition Company (the respondent), the latter being an off-shoot of the parent company in England (p. 127, x-Q. 290). These predecessors of the respondent in the ownership of the alleged trade-mark were also its predecessors in the business it is now carrying on. The sixteen years' laches in England of its predecessors is, therefore, pertinent in the case. The respondent took said alleged trade-mark by assignment from assignors, who had for sixteen years been guilty of laches in the assertion of their alleged monopoly. The respondent stands in the place of such predecessors, and took the assignment of the alleged trade-mark, subject to the legal consequences of the assignors' laches for sixteen years.

The petitioner and its predecessors sold "Rahtjen's Composition, Holzapfel's Manufacture," in the United States continuously ever since they began in 1883 to make and sell it in England. At this long interval of time it has been impossible to get competent evidence of the *first* knowledge of the agents in this country of respondent's predecessors.

But Clark, a witness for the respondent, who was called to prove that his deceased father was agent in this city from 1886 to 1888, inclusive, for the Rahtjen's composition of respondent's predecessor, and that he (the witness) was in such agent's employ at that time, says that he knew Donald & Co. to be the agents in this city of Holzapfel's Rahtjen's composition 12 or 13 years ago (p. 257, Qs. 22, 24). He had a conversation with Donald about it, and was cross-examined as follows:

Re-x Q. 32. When Mr. Donald solicited you to buy the Rahtjen's composition made by Holzapfel was not what he told you as follows: That it was made according to the same formula as the Rahtjen's composition which you were familiar with?

Same objection as to x-Qs. 20, 21, 23 and 24.

A. Yes, sir; that was his idea of it.

Re-x-Q. 33. You knew at the time, did you not, that the Rahtjen's composition Holzapfel's manufacture, which Mr. Donald solicited you to buy, was not made by the same firm or manufacturer who made the Rahtjen's composition with which you were familiar?

Same objection.

A. Well, being different firms, no, I never thought it was the same people who were manufacturing the paint.

Re-x-Q. 34. And you did not intend in your testimony to be understood that Mr. Donald represented to you that it was the same people who were making the paint?

A. No, the same formula.

Re-x-Q. 35. You knew then that there were two rival establishments making the paint, but understood that the paint made by both were from the same formula?

A. Mr. Donald gave me to understand that (p. 259, Re-x-Qs. 352-35).

Various other witnesses in the United States have testified to the continuous competition for orders for Rahtjen's Composition, between the petitioner and the respondent, and it was well known in the shipping circle of this city for 12 years past that there were two Rahtjen's Compositions for sale—viz., Hartman & Co.'s Rahtjen (for sale by Petersen) and Holzapfel's Rahtjen (for sale by Donald & Co.).

See testimony of—

Coverly, a clerk in the office of Henderson Bros. (p. 387, Qs. 8–10).

Haffner, chief clerk for Bowring & Archibald (p. 390, Qs. 11–19).

Orington Linnekin, superintendent of the New York Dry Dock and Repair Co., East River, N. Y. (p. 393, Qs. 8–14).

John Adair, superintendent of the Tweedy Trading Co. (p. 396, Qs. 11–16; p. 397, Q. 21). Adair also knew of the Rahtjen Composition made by Holzapfel's in England years ago.

Q. 28. You can state any prior instance to the painting of the "Aguan," where you have had personal dealing or transaction with Rahtjen's Composition, Holzapfel's manufacture? A. I had it put on a steamer at Newcastle, England, about thirteen years ago; thirteen to fourteen; I am not sure as to the date.

Q. 29. Do you mean that you had a steamer painted with it at Newcastle, England? A. Yes.

Q. 30. Do you remember the name of the steamer? A. "Totomo Maru."

Q. 31. Do you remember any other instance when you had any dealing in Rahtjen's Composition, Holzapfel's manufacture? A. Yes.

Q. 32. You may state what? A. At the same time I took out a consignment to Japan.

Q. 33. You mean a consignment of Rahtjen's Composition Holzapfel's manufacture?

A. Yes.

Q. 34. What did you do with the consignment when you arrived in Japan? A. Sold it to the Japanese Government.

P. 398, Qs. 28–34.

Oswald Miller, superintendent for R. W. Cameron & Co. (p. 402, Qs. 11–13; 22–27).

Mr. Andresen, assistant manager of petitioner's company's office in New York City, cites an instance to show that *Mr. Petersen*, the agent for the respondent's predecessors (and the now president of the respondent corporation) knew that Donald & Co. were selling Rahtjen's Composition Holzapfel's manufacture, at least as early as 1891 (p. 345). *Mr. Petersen* himself admits that he knew Donald & Co. were advertising Rahtjen's Composition Holzapfel's manufacture, at least as early as 1892 or 1893, and that his company made no objection or protest (p. 45, x-Qs. 140–145). He saw their advertisement in the "Maritime Register" in 1893 (p. 56, x-Q. 209). He also heard rumors from abroad, and from his own agents, that petitioner's Rahtjen paint was offered in the market (p. 56, x-Q. 227), and that he had in mind the petitioner's company when he issued the circular in 1893 (p. 60, x-Q. 246).

Was this "easy indifference" of the respondent and its predecessors commendable? Was not the course of conduct of the respondent and its predecessors during these 16 years directly to encourage the petitioner and its predecessors in the use of the alleged trade-mark? Is the respondent at this late day and in view of the

changes which the lapse of time has wrought, entitled to any relief in this Court? Such undue and unexplained delay under the circumstances, we respectfully submit, renders it inequitable to grant an injunction.

The cases are many in which this defense of laches has been invoked and considered. It is true that by reason of their difference of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned, and that, because of the change in condition during this period of delay, it would be an injustice to the adverse party if the stale claim were now permitted to be enforced.

In *Mackall vs. Casilear*, 137 U. S., 556, this Court said:

"The doctrine of laches is based upon grounds of "public policy which requires for the peace of society "the discouragement of stale demands. And where "the difficulty of doing entire justice by reason of the "death of the principal witness or witnesses, or from "the original transaction having become obscured by "time, is attributable to gross negligence or deliberate "delay, a Court of equity will not aid a party whose "application is thus destitute of conscience, good "faith and reasonable diligence."

In *Hammond vs. Hopkins*, 143 U. S., 224, 250, this Court said:

"No rule of law is better settled than that a court "of equity will not aid a party whose application is "destitute of conscience, good faith and reasonable "diligence, but will discourage stale demands, for the "peace of society, by refusing to interfere where there "have been gross laches in prosecuting rights, or

" where long acquiescence in the assertion of adverse " rights has occurred."

In *Abraham vs. Ordway*, 158 U. S., 416, this Court said :

" One of the grounds upon which courts of equity " refuse relief where the party is guilty of laches is the " injustice of imposing upon the defendant the neces- " sity of making proof of transactions long since past " in order to protect himself in the enjoyment of rights " which, during a considerable period, have passed un- " challenged by his adversary, with full knowledge of " the circumstances."

This principle of equity jurisprudence is, of course, applicable to patent and trade-mark suits, and has been followed by the Circuit Court of Appeals in the following well-known cases :

In *Prince's Metallic Paint Co. vs. Prince Mfg. Co.*, a purchaser on foreclosure of a property and business which had long been conducted in connection with a trade-mark, continued to use the trade-mark, with full knowledge of the former owner, for eight years without objection. The Court said :

" In courts of equity the rule is to withhold relief " where there has been unreasonable delay in prose- " cuting a claim, or long acquiescence in the assertion " of adverse rights. Again and again it has been " judicially decided that nothing can call into activity " a court of equity but conscience, good faith and rea- " sonable diligence. In McLaughlin vs. Railway Co., " 21 Fed., 574, Judge BREWER held a bill for infringe- " ment of a patent, alleging use and construction of a " patented invention for 13 years without stating an " excuse for the plaintiff's delay in suing to be demur- " rable. Laches for even less than the statutory " period of limitations, aided by other circumstances, " will bar a right (Ashhurt's Appeal, 60 Pa. St., 290). " In Lewis vs. Chapman, 3 Beav., 133, the Master of " the Rolls refused an injunction to restrain the in- " fringement of a copyright solely on the ground of 6½

" years' delay, where there was knowledge of the com-
" mencement and prosecution of the defendant's pub-
" lication. Long acquiescence before filing a bill for
" an injunction, with full knowledge of the infringe-
" ment, is deemed laches equivalent to a breach of
" good faith (Brown, Trade-Marks, § 497). Hence, in
" Manufacturing Co. vs. Garner, 55 Barb., 151, a delay
" of nine years in applying for an injunction to restrain
" infringement of a trade-mark was held to be a good
" cause for refusing it." The bill in the above case was dismissed.

(C. C. A., Sept., 1893.) Prince's Metallic Paint Co. vs. Prince Mfg. Co., 57 Fed., 938 (944); affg., s. c., 53 Fed., 493.

In *La Republique Francaise vs. Schultz* the defendant had for 30 years manufactured and sold "Vichy water," during which period his said business had grown to a large and profitable one. He always associated his name with his product, and advertised it as "Schultz's Vichy Water." (Just as the defendant in the present suit has always advertised its product as Holzapfel's Rahtjen's Composition or Rahtjen's Composition, Halzapfel's Manufacture.) Judge WALLACE, in deciding this case at Circuit, said:

" Equity is indisposed to assist parties who have
" slept upon their rights and acquiesced in their ap-
" propriation by others for a great length of time.
" The unexampled delay and acquiescence in the pres-
" ent case, I think, should defeat the action."

The bill was dismissed.

(C. C., May, 1899.) La Republique Francaise vs. Schultz, 94 Fed., 500. (Since affirmed by the Circuit Court of Appeals.)

In *Saxlehner vs. Eisner & Mendelson Co.* the complainant made the Apollinaris Company his agent in the United States in 1876, for the exclusive sale of his Hunyadi Janos Water, put up in bottles with a distinctive red and blue label. All went well until 1888,

nine years before the beginning of the suit, when infringements commenced and continued uninterruptedly during that period. To check this appropriation of his trade name and trade label in the United States, Saxlehner did nothing during these nine years. The Apollinaris Company, whom he had over his signature proclaimed to the world as the suppressor of infringements, in 1889, and again in 1890, announced that it had adopted an additional trade-mark of selection *(a red diamond)*, which was to distinguish the Hunyadi Water sold by it. *This is analogous to the appellant and its predecessors, adopting the "Red Hand" after the alleged infringements had commenced, and laying stress upon the fact that no Rahtjen's Composition was of their manufacture unless stamped with the red hand.)* In deciding the case the Circuit Court of Appeals said:

"In view of these facts, of the continued and in-
"creasing appropriation by competitors of his label
"and of his trade name (as a generic designation), can
"a complainant, who has for nine years done nothing
"towards maintaining or even asserting his original
"rights, now be heard to suppress the competition
"which his supineness has allowed, and, indeed, in-
"vited and encouraged to grow up? We think not."

(C. C. A., Jan., 1899) Saxlehner vs. Eisner & Mendelson Co., 91 U. S., 536.

In *Starrett vs. Stevens Arms & Tool Co.*, it appeared that the compainant was aware ten years before bringing suit that the defendant was manufacturing and selling the alleged infringing device, and that at that time complainant had a correspondence with defendant in reference to the proper construction of complainant's patent and alleged infringing device made by defendant, but did nothing more to pursue his claim for the following ten years, during which time defendant continued to manufacture the alleged infringing device, and built up a large and profitable business therein.

(The present case is even stronger than this, since no claim or demand was made by the appellant or its predecessors on the defendant or its predecessors before suit was brought, 16 years after the alleged infringement commenced.) The Court said :

" It would operate as a great injustice at this late " day to interfere with an established business con- " ducted under an open claim of right for so many " years. The laches in this case are such as to debar " not merely the claim for profits, but any claim to the " interposition of a court of equity ;" and the bill was dismissed.

(C. C., July, 1899, Starrett vs. Stevens Arms & Tool Co., 96 Fed., 244.

In Richardson vs. Osborne & Co. the complainant for about fourteen years witnessed the infringement of his patent by the defendant, during which time the defendants expended time and money in building up their business. The Circuit Court of Appeals, in deciding the case, said :

" The complainant says he sent notices to the man- " ufacturers, and, among others, to the defendant cor- " poration, in the latter part of 1883 and met the presi- " dent in Lake City by appointment in January, 1884. " He says : ' We had some conversation. He asked " ' what our claim was. He was told it was on the " ' combination. We talked together perhaps fifteen " ' minutes pleasantly.' In May, 1890, an action at " law was brought against the Minneapolis Harvester " Works, which was compromised before trial, in Sep- " tember, 1891, by the payment of money and a re- " lease by the complainant. He did not tell how much " money was paid or whether it was in recognition of " the validity of the patent. For aught that ap- " pears, all that the defendant did was to pay " a trifling sum to be free from a lawsuit. " No other proceeding was instituted until the " present suit. The only thing which can be " during the entire history of the invention character-

" ized as an active exercise of ownership was the Min-
" neapolis suit, and its outcome is so vague and
" shadowy that it cannot be told whether it was a suc-
" cessful or an abandoned attempt to sustain the patent.
" The continued refusal or neglect of the joint owners
" to impart life to it was so manifest that a Court can-
" not look with favor upon the present attempt to gain
" money from manufacturers who invested in the effort
" to supply the demands for the Appleby machines,
" under the belief that it infringed no patent, a belief
" which the conduct of the owners of the Fowler Pat-
" ent encouraged." The decision below dismissing the bill for laches was affirmed.

(C. C. A. Apr., 1899.) Richardson vs. Osborne & Co., 93 Fed., 828, affirming s. c. 82 Fed., 85.

In the present suit (whether we consider the 16 years in England, or the 12 years in the United States, of the uninterrupted use of the alleged trade-name, by the defendant or its predecessors) there was such inexcusable laches that the decree of the Circuit Court dismissing the bill of complaint, should have been affirmed by the Circuit Court of Appeals.

Conclusion.

We respectfully urge upon the Court that this case partakes of international and public interest, not only affecting the whole maritime world, but being of especial interest to the Government of the United States. It is in evidence on the record, as the Court will see, that the complainants in the court below admitted by the witness Petersen (Record, pp. 51 and 52, x-Q. 187, x-Q. 188, x-Q. 189, x-Q. 190) that the main reason for bringing suit was the successful competition and un-

derbidding of them in the matter of price for this paint for the Navy Department. In this respect the Government of the United States is an interested party in this case, in the efforts of the petitioners to break down a monopoly, beget healthful competition and lower prices to the great benefit of the Government. The case is also of lively international interest, as it will make an article of prime necessity in the shipping world a monopoly in the United States while subject to free competition in every other port in the world. If the decision of the Circuit Court of Appeals stands, while it will be legal for anyone to sell under the brand of 'Rahtjen' a paint for ships' bottoms in Great Britian and Europe, the same paint with this brand on cannot be obtained in the United States unless by paying tribute to the monopoly, which will result from the present decision. What will be lawful and proper in the whole shipping world outside of the United States will be a crime here. An article in which the name is part of the thing itself, woven into the very fibre of its existence will here become an exclusive property under that monopolistic form which is odious to the law, while free as air to the use of everyone outside the jurisdiction of this Court.

It is respectfully submitted that in view of the novel questions involved in this case and upon all the facts thereof, this petition for a writ of *certiorari* should be granted.

JOHN G. CARLISLE,
WM. MCADOO,
R. B. MCMASTEN,
Counsel for Petitioner.

Office Supreme Court U. S.
FILED
SEP 29 1900
JAMES H. McKENNEY,
Clerk.

No. 267. 54.

Brf. of Sands for Petitioner (on mo.)

Filed Sept. 29, 1900.

In the Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 267.

HOLZAPFEL'S COMPOSITIONS CO. (LIMITED), *Petitioner*,

vs.

RAHTJEN'S AMERICAN COMPOSITION CO., *Respondent.*

Objections to Motion of Respondent.

Now comes the petitioner in the above-entitled cause, by its counsel, and submits to this Honorable Court these its objections to the motion submitted this 28th day of May, 1900, in behalf of the said respondent by its counsel.

And for grounds of objection petitioner states that no proper or sufficient notice of said motion has been served upon the petitioner above named or its counsel; a copy of said motion, and of the petition annexed thereto, having been handed to petitioner's counsel, at their office in New York, *after the hour of 12 o'clock, noon*, on Saturday, May 26, 1900, less than 24 hours (excluding Sunday) prior to the submission of said respondent's motion to this Honorable Court.

Secondly. Because the motion is frivolous, inasmnch as it simply asks of this Court to duplicate the writ of certiorari to the Honorable the Judges of the United States Court of Appeals for the Second District, already granted on this petitioner's motion in this cause, to wit, on the 21st day of May, 1900, which action by this Court renders the present motion unnecessary.

Thirdly. And your petitioner further states that the reason for the motion advanced by the respondent in his petition, paragraph II, to wit, that the Court of Appeals below "erroneously refused an accounting for damages or profits" being clearly a matter within the discretion of the Court below, and finally decided there, presents a question upon which error is never assignable (see Phillips Practice, Sup. Ct., second edition, page 184, Chap. XXII. and the many authorities cited), and its finality was conceded by the respondent in his brief in opposition to this petitioner's application for the writ, when on page 9 of brief he makes the denial of damages by the Court below the basis of an argument against the issuance of the writ on petitioner's application in the following language, to wit:

"The defendant can be subjected to no loss whatever as "to the past, because there is no accounting in damages "The only detriment to which it (the defendant corporation) "can possibly be subjected, is being prevented from making "sales of Rahtjen's Composition to parties demanding it in "preference to the petitioner's own brand, viz.: "Interna-"tional;" or, in other words, from selling to the customers "of the respondent instead of its own. Its legitimate busi-"ness can in no wise be affected by the present decree and "injunction."

This was the argument used against the granting of the writ of certiorari prayed for by the Holzapfel's Compositions Company, which this Court granted notwithstanding the opposition so made—and as this opposition so expressed in that brief recognized that it was satisfied with the advantage it had so gained in the Court below to the great injury of the defendant company—it cannot now, in reason, ask that the question of damages should be made the subject matter of argument at the hearing on the merits—to divert the attention of this Court from the consideration of the

issues of law involved in the hearing granted which go to the respective rights of the parties to the use of the word "Rahtjen" the only issue in the controversy upon bill—answer and evidence.

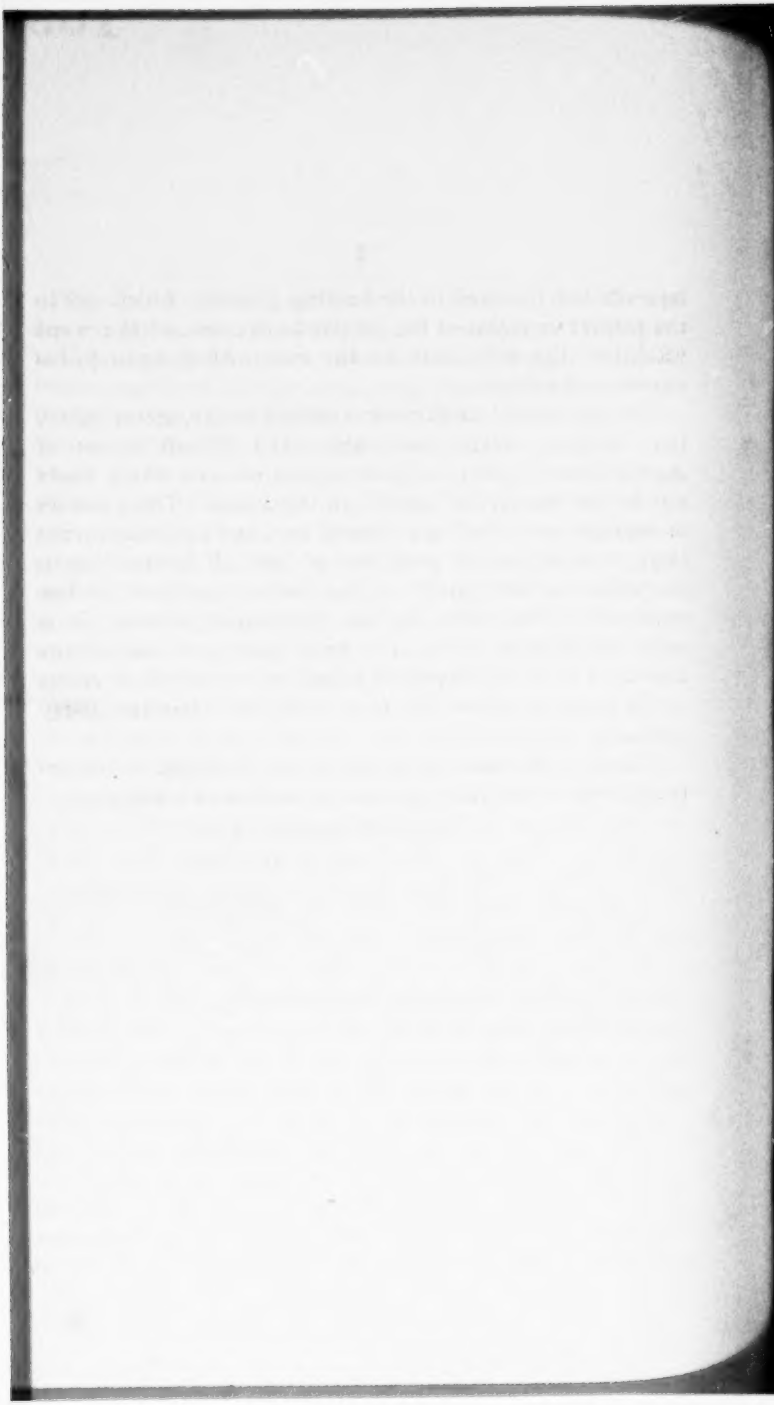
The question of damages was settled by the decree below, that being a matter over which the Circuit Court of Appeals had full and exclusive discretion, and which could not be the subject of appeal to this court. The question of damages is entirely a collateral one, and confined to the facts, on well settled principles of law. It has nothing to do with the settlement of the novel question of law presented in this brief, by the petitioners herein. It is only intended to cloud the real issue, and divert the argument from the questions raised by the manifest errors in the decision below and from which the defendant petitioner appealed.

Wherefor, we most respectfully ask a denial of the petition filed by the Respondent, the Rahtjen's Company.

Respectfully submitted,

F. P. B. SANDS,

of Counsel for Petitioner.



No. 267.

Brf. of Carlisle for Petitioner

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FILED
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JAMES H. McKENNEY,
Clerk.

Filed April 15, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY.

BRIEF FOR HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED.

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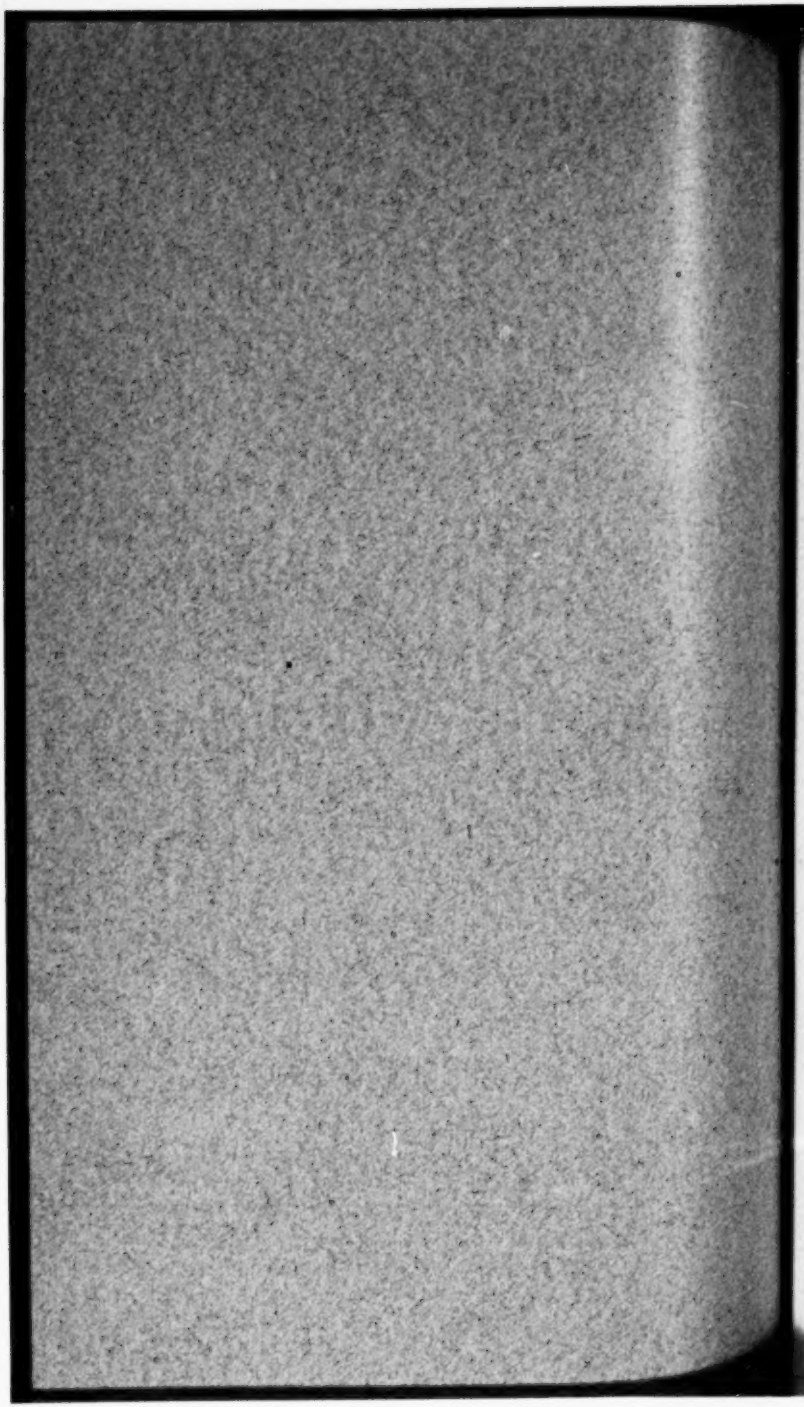

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY.

BRIEF FOR HOLZAPFEL'S COMPOSITIONS CO., Limited.

Statement of Facts.

This case comes before this Court on *writ of certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination, the case of Rahtjen's American Composition Company, Appellant vs. Holzapfel's Compositions Company, Limited, Appellee.

The said suit was brought for an accounting and an injunction to restrain the defendant, an English Corporation, from using in this country the name "Rahtjen" on a composition or paint for ships' bottoms.

The answer set up that the composition had been patented in England, and that said patent had been forfeited in 1880; that thereby the name "Rahtjen," by which the article had become known during the life of the patent, had become public property. It also pleaded efforts made by the complainant's predecessors to obtain registered trade-marks therefor, and successful opposition made thereto by defendant's predecessors, resulting in a disclaimer to the word "Rahtjen" filed by complainant's predecessors. It also set up that complainant's predecessors had not marked the vessels containing the composition with the alleged trade-mark until after the defendant's predecessors had entered the field. It also alleged fatal laches on the part of the complainant and its predecessors. It denied unfair competition.

A large amount of testimony was taken abroad, by both parties to the suit, relating to the English history of the alleged trade-mark.

The undisputed facts in the case, are as follows:

One Rahtjen invented a composition for ships' bottoms, and in 1871 and 1872 made a few experimental sales thereof through Suter, Hartmann & Co., in England, and through Henry Gelien, in the United States.

In 1873, Rahtjen patented the composition in England. He desired to patent it in the United States, but feared that his application for a patent here would be refused for lack of novelty or invention. Thus he wrote Gelien: "It appears from inquiries made that it will be very difficult in the United States to obtain a patent, one of the reasons for this being that my paint contains some ingredients which are already known as components of paint, and the Patent Office will probably object to this and reject the application for the patent. But in my opinion, it is better to forego the patent, rather than apply for a patent and receive a refusal" (Record, p. 189).

In 1880 the patent was forfeited for non-payment of taxes under the English Patent Law..

On April 21, 1883, M. Holzapfel & Co., of Newcastle-on-Tyne, the predecessors in interest of the defendant, commenced to manufacture the said composition in accordance with the expired patent, and to sell the same under the name "Rahtjen's Composition," that being the name it was known by during the life of the patent. On the same day, they filed their first application for registered trade-mark in England, which was granted, and they subsequently obtained registration in England for several modifications of the same. In all of these applications they disclaimed the *exclusive* right to the use of the word "Rahtjen." One of the foregoing trade-marks they also registered in the United States. Subsequently they registered the representation of a propeller. All of these trade-marks are now owned by the defendant.

On April 27, 1883, one of the complainant's predecessors applied for registration in England of an open "Red Hand" surrounded by the words "Genuine _____ Composition. Trade-Mark. Hartmann's Manufacture," as a trade-mark for their composition, and this was granted, and ever since has been used by complainant and its predecessors as a distinguishing trade-mark to mark said composition made by them; and complainant and its predecessors have laid stress upon the fact that no Rahtjen's Composition was of their manufacture unless stamped with the "Red Hand."

In June, 1883, after the expiration of the patent, and after M. Holzapfel & Co. had commenced to make and sell said composition, and at divers subsequent times throughout the year, various attempts were made by the Rahtjen firm and their agents, Suter, Hartmann & Co., to register in England the words "Rahtjen's Composition" (and modifications of said words), but without success. Finally Suter, Hartmann & Co., by *disclaiming the exclusive right* to the use of the word

" Rahtjen's," obtained a registration in England for a certain combination of words, of which their name, Suter, Hartmann & Co. was an essential part.

In 1885 the predecessors of complainant, the Rahtjen firm and Suter, Hartman & Co., brought suit in Belgium against W. Wright, of Brussels, for putting on the sign on his house the inscription, " Manufacturers of Rahtjen's Composition," and for announcing in his prospectus and other means of publication that he sold the " Original Rahtjen's Composition for ships' bottoms, manufactured by the London Oil & Color Co., Ld." In this suit the Rahtjen firm and Suter, Hartmann & Co. were finally defeated, the Court holding, among other things, that, although Rahtjen was the inventor of the composition for ships' bottoms known by the name of Rahtjen's composition, and had given over the right to trade in that product to Suter, Hartmann & Co., yet, as his English Patent had expired, his invention had become the property of the public, and that the defendant was consequently authorized to manufacture and sell said composition under the name " Rahtjen " generally used to describe it.

In 1897 Rahtjen instituted criminal proceedings in Hamburg, Germany, against Max Holzapfel and his Hamburg agents for selling the composition as " Rahtjen's," and for circulating announcements, price lists and business letters relating to same as " Rahtjen's." The Court decided that, in view of the lapse of the English Patent, the manufacture of the paint in accordance therewith became public property, and that the defendant was entitled to make and sell it in Germany as " Rahtjen's Composition, Holzapfel's Manufacture."

The complainant company and its predecessors in interest (who are still the largest stockholders in the complainant company) have known of the use by the defendant and its predecessors in business of the word " Rahtjen " in connection with said composition manufactured by the latter ever since early in 1883.

His Honor Judge WHEELER, holding Circuit Court, dismissed the bill of complaint. The decision is reported in 97 Fed., 949, and will also be found at page 419 of the printed record in this case.

From this decision the complainant appealed. The assignment of errors filed with the appeal will be found at page 421 of the printed record.

The Circuit Court of Appeals for the Second Circuit, by a divided court, reversed the Circuit Court and ordered an injunction, but no accounting.

Judge SHIPMAN wrote the opinion, Judge LACOMBE concurring therein (pp. 427–431). Judge WALLACE wrote a dissenting opinion (pp. 432, 433).

The Holzapfel's Compositions Company, Limited, thereupon filed a petition to this Court for a *writ of certiorari*. In its petition, said Company claimed :

FIRST. That when a name under which an article has become known in the country in which it was patented, becomes public property there, by reason of the expiration of the patent, it becomes public property the world over (except in such countries where there may be valid, existing patents, on said article, unaffected by the term of the foreign patent).

SECOND. That, under the circumstances stated in the foregoing claim, the right to manufacture the article, and sell it as being made in accordance with the expired patent, has become public property and open to the entire world.

THIRD. That if the Rahtjen's Company or its predecessors ever acquired a common law trade-mark in the United States, such trade-mark became public property when the English Patent expired.

FOURTH. That the Rahtjen's Company cannot have a common law trade-mark in the United States in a name which has become public property abroad.

FIFTH. That the name "Rahtjen's Composition" has become the generic description of a patented article and passed to the public on the expiration of the patent.

SIXTH. That the name "Rahtjen's Composition" has long ceased to denote the source of manufacture.

SEVENTH. That the Rahtjen's Company and its predecessors, having stood silently by for very many years and allowed the petitioner's predecessors to build up an established business in "Rahtjen's Composition," and the business having been subsequently incorporated with a large capital and numerous new stockholders, is forever estopped from enjoining or interfering with the petitioner's use of the word "Rahtjen's."

EIGHTH. That the sale by the predecessors in business of the Rahtjen's American Composition Company was not large enough, or conducted for a long enough period in the United States, for the said company to have acquired a common-law trade-mark in the United States prior to the application for the English Patent.

NINTH. That the act of the predecessors of the Rahtjen's Co. in disclaiming the exclusive use of the word "Rahtjen" when they applied for the registration of a trade-mark in England estops them from claiming such exclusive right now in this country.

The petition was granted on May 21, 1900.

The case is now before this Court on *writ of certiorari.*

Throughout this brief, following the designation before the courts below, we shall term Rahtjen's American Composition Company the complainant and Holzapfel's Compositions Company, Limited, the defendant.

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I.

The question raised on the threshold of the case is whether a party can own a trade-mark here when he has lost that same trade-mark in a foreign country by the expiration of a patent of that country, owned by him on the article.

This question, so far as the reported decisions go, is a novel one.

Prior to this suit the line of decisions in this country relate only to the effect of the expiration of a United States Patent on a trade-mark used here. The law has become well settled on that point, and it has been uniformly held by our Courts that the name given to the article during the life of the patent becomes public property when the patent expires.

It was so held in the case of the "Singer Sewing Machine."

Singer Mfg. Co. vs. June Mfg. Co., 163 U. S., 169.
Singer Mfg. Co. vs. Riley, 11 Fed. Rep., 706.
Singer Mfg. Co. vs. Stanage, 6 Fed. Rep., 279.
Singer Mfg. Co. vs. Larsen, 8 Biss., 151.

And in the case of "Yale Locks."

Ex parte Yale & Towne Mfg. Co., 81 Pat. Off. Gaz., 801.

And in the case of "Fairbank's Scales."

Fairbanks vs. Jacobus, 14 Blatchf., 337.

And in the case of "Goodyear Rubber."

Goodyear India Rubber Glove Mfg. Co. vs. Goodyear Rubber Co., 128 U. S., 598.
Goodyear Rubber Co. vs. Day, 22 Fed. Rep., 44.

And in the case of " Leclanche " batteries.

Leclanche Battery Co. vs. Western Electric Co., 21 Fed. Rep., 538; 23 Fed. Rep., 276.

And in the " Castoria " cases.

Centaur Co. vs. Heinsfurter, 84 Fed. Rep., 955.

Centaur Co. vs. Killenberger, 87 Fed. Rep., 725.

Centaur Co. vs. Neathery, 91 Fed. Rep., 891.

Centaur Co. vs. Marshall, 92 Fed. Rep., 605.

And the same rule has been laid down in England.

See " Cheavin's Patent Filter Case."

Cheavin vs. Walker, Law Rep., 5 Chan. Div., 850.

And in the " Wheeler & Wilson " case.

Wheeler & Wilson Mfg. Co. vs. Shakespeare, 39 Law (N. S.) Ch., 36.

And in the " Linoleum " case.

Linoleum Mfg. Co. vs. Nairn, 47 Law J. (N. S.) 431.

But the text-books, and Federal and State decisions, may be searched in vain for any discussion or statement of the effect of the expiration of a foreign patent on a trade-mark used here, as well as abroad, by the owner of such expired patent.

The present case raises this question, and it is of great importance to the commercial community at large what the rule to be established by this Court shall be.

We contend that where a name under which an article has become known in the country in which it

was patented, becomes public property there by reason of the expiration of the patent, it becomes public property the world over, except in countries where there may be valid existing patents on said article unaffected by the term of the foreign patent, which is not the present case.

The history of "Rahtjen's" composition is a continuous one, and it cannot be considered in sections, chronologically or geographically. Everything connected with this paint from the time it was invented by Rahtjen, until the present time, bears upon the question at issue.

A bottom paint of this description, to be successful, must acquire a wide reputation and have more than a local standing.

The ship that paints with it in Liverpool may dock again in New York, or Rio de Janeiro, or San Francisco, or Hong Kong, or Genoa, and must find the same paint in such far-away ports.

A composition like this, therefore, lives its life in the whole maritime world.

It must be remembered, too, that, at the time the Rahtjen composition was patented and became known, the carrying trade of the world was done mainly by England. It was English ships, painted with this bottom paint, that made known and established a demand for it in all quarters of the world.

Thus Rahtjen's paint went around the earth and became known as a patented composition during the life of the English Patent, and when that patent expired the generic appellation by which it had been known during the life of the patent became *publici juris*, not only in England but everywhere.

The history of "Rahtjen's" composition pivots around the Rahtjen English Patent in evidence (pp. 387–393).

The sales, prior to taking out the patent, were very small and largely for experimental purposes. *

It was during the life of the patent, as will be seen from the record, that the paint became known in England and throughout the maritime world. It was during this period that the circulars, signs and business advertisements of this composition, not only in Europe, but in the United States, invariably used the word " patent " (meaning the English Patent) thus— " Rahtjen's Patent Paint."

A circular of the firm of John Rahtjen is identified by John Rahtjen and is in evidence (" Defendant's Exhibit Rahtjen Circular," Record, p. 410). This circular bears on its face the words " Rahtjen's Patent Composition, by Royal Letters Patent," accompanied by the representation of the English Royal Coat of Arms. John Rahtjen testifies that, in calling the composition " Patent Composition," he meant it was covered by the English Patent (p. 127, x-Q. 285, x-Q. 287). Rahtjen says it was " Rahtjen's Patent Composition as " long as we had a patent, and ' Rahtjen's Composi- " tion ' afterwards. During the time the patent was " in existence we used the word ' Patent,' and we " dropped it afterwards " (p. 151, Qs. 500, 501).

All of the letter-heads, bill-heads, invoices, etc., of complainant's predecessors, and their agents, until the patent was forfeited in 1880, contained the words

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* Rahtjen's testimony regarding shipments to Gelien in the United States do not agree with the latter's testimony.

	1870.	1871.	1872.
Rahtjen testifies that his shipments to Gelien were (p. 139, Q. 373)	$82	$2,217	$2,074
Gelien testifies that his shipments from Rahtjen were (p. 167, x-Qs. 23-25).....	None	$2,432	$829

"Rahtjen's Patent Composition." This was so in *England* (see "Suter, Hartman & Co's. Invoices, 1877, 1878 and 1879," p. 394; "Rahtjen's Advice Notes, 1878 and 1879," p. 395; "Exhibit V," p. 192; "Exhibit W," pp. 192, 193; "Exhibit JJ," p. 198), and also in the *United States* ("Exhibit T," p. 190; "Exhibit U," pp. 191, 192).

A number of witnesses also testified that it was always reputed and represented to be made under a patent (p. 297, Q. 67; p. 313, Q. 11; p. 344, Q. 10; p. 351, Q. 11; p. 348, x-Q. 63; p. 348, x-Q. 71), and that it was the patent that gave it its value.

We thus see the stress that was laid upon this English Patent during its life by the makers and sellers of the Rahtjen composition.

The English Patent was forfeited, revoked and canceled upon the failure to pay the tax imposed on it, at the end of the first seven years, to wit—on November 29th, 1880 (pp. 393, 394).

Thereupon the right to manufacture it in England became public property. The right to manufacture it elsewhere had always been public property, because nowhere, except in England, had it ever been protected by patent.

But more than this: Not only could any person, after the forfeiture of the English Patent in 1880, make this Rahtjen's composition in England and elsewhere, but he could also sell it. And sell it under what name? Why, under the name, and the only name, it was known by during the life of the English Patent. During the life of that patent the paint became *generically* known as "Rahtjen's." The maritime world knew it as "Rahtjen's." That was its generic description throughout the world. And if, after the expiration of that patent, one wanted that product or paint, he could ask for it by no other name. And the manufacturers could sell it under no other name. The property in the name could no more survive here than

it could in England and abroad after the expiration of the English Patent.

When an invention falls into the public domain it enters with the name which the inventor has given it. The ex-patentee cannot have a trade-mark in this country in a name for a maritime article which is common property everywhere else. If he or his representatives desire to continue the manufacture of the article after the expiration of the patent and desire to protect his or their reputation as manufacturers thereof, he or they must adopt a new and arbitrary trade-mark, and build up the rights of ownership therein exactly as would a stranger.

This contention, while opposed to the opinion rendered herein by Judge SHIPMAN, is supported as follows :

1. By the dissenting opinion of Judge WALLACE, in the Circuit Court of Appeals.
2. By the opinion of Judge WHEELER, sitting at Circuit.
3. By the decision of the Belgian Court of Appeals.
4. By the decision of the Criminal Court in Hamburg.

We shall take these decisions up in the following order :

The Belgian Decision. From the facts stated in this decision, it appears that in 1885 Rahtjen and Suter, Hartmann & Co. (the predecessors of Rahtjen's American Composition Co.), brought suit in Belgium against W. Wright, the agent of the London Oil and Color Co., for putting on the sign of his house the inscription, " Manufacturers of Rahtjen's Composition," and for announcing that he sold " Original Rahtjen's Compositions for Ships' Bottoms, manufactured by the London Oil and Color Co., Limited." It appeared that Rahtjen, the inventor of the paint and the prede-

cessor of the complainant, had patented the article in England, in 1873, and that this patent was forfeited in 1880. During its life, however, the article had become known in the maritime world under the generic name, "Rahtjen's Composition." On the expiration of the patent in England, the London Oil & Color Co., Limited, made the paint in England and shipped it to Wright to be sold in Belgium under the name "Rahtjen's Composition." The complainants then commenced this action to restrain the unlawful use of the word "Rahtjen." The Brussels Court of Appeals, in reversing a judgment in favor of the complainants, held: (1) That when the English Patent expired any person could make the product in England, calling it Rahtjen's Composition, and that the product so made could be shipped to Belgium and sold there; (2) That any person who could make the article in England and sell it Belgium could call it in Belgium by the name it had acquired during the life of the English Patent (pp. 358-360).

The German decision. From the statement of facts in this decision it appears that in 1897 John Rahtjen instituted criminal proceedings in Hamburg, Germany, against Max Holzapfel and his Hamburg agents, Joost & Schultz, for marking the composition and also the announcements, price-lists, business letters, &c., with the name of "Rahtjen." The facts in the case are very fully stated in the opinion, wherein the fact that Rahtjen was the inventor of the composition, and had sold it for a considerable period under his own name; that on November 29, 1873, he obtained a patent in England for the paint under the title "Preservative Composition for Ships' Bottoms, &c.," but that, owing to failure to pay the tax under the English Patent Law, the patent lapsed, is fully recited, and the Court said, "The manufacture of the paint in accordance with the patent therefore became public property."

The substance of the decision is that the words "Rahtjen's Patent" Composition conveys to any interested party no other meaning than that the composition recommended was manufactured in accordance with Rahtjen's Patent. That it could possibly be a preparation of Rahtjen himself, this form of expression was not likely to suggest to any person belonging to the class among whom such goods were sold. The assumption that the goods recommended were supplied from Johann Rahtjen's works was further refuted by the fact that the Holzapfel's Company expressly called itself "Manufacturers of Genuine Rahtjen's Patent Paint," and added, "Warranted made according to Rahtjen's original specification." This addition removed any doubt as to the goods offered not being Rahtjen's manufacture. Besides, this addition was conformable to the truth. The witness Rahtjen himself admitted that the defendant Max Holzapfel doubtless manufactured the paint according to the original patented receipt of his (Rahtjen's) father, which he had found in the specification. Besides, the defendant Max Holzapfel had been most energetic to remove any doubt as to his company being the manufacturer of "Rahtjen's Patent" composition, for he actually referred to their own trade-mark and recommended customers to specially ask for "Holzapfel's" manufacture. Where, therefore, the name of "Rahtjen" was so used, the possibility of that portion of the public which might be desirous of purchasing goods of this kind being misled as to the origin of the goods was out of the question (pp. 364, 365).

Judge WALLACE'S *opinion.* Judge WALLACE says: "I "am of the opinion that the alleged trade-mark of the "complainant is public property—first, because the "name was the generic description of a *patented* arti- "cle, and passed to the public upon the *expiration of* "*the patent.*" He then recites the facts in the present case, and, after dwelling on the Belgian decision, says:

"I am at a loss to understand why any different de-
"cision should be made in this country, but the Court
"seems to be of opinion that the name is a good
"trade-mark here, because no patent was ever ob-
"tained for the article in this country, and because
"the successors in business of Rahtjen have always
"sold it here under the name originally applied to it.
"This means that a man can have a trade-mark in this
"country in a name which is common property every-
"where else. If this is good law, then any person
"here buying in Belgium, or elsewhere in Europe, or
"in England, the article known as Rahtjen's composi-
"tion, can be prevented from dealing in it here under
"the name by which he bought it. So long as Rahtjen
"and his associates and successors in business en-
"joyed a monopoly of the manufacture of the article,
"the name not only identified the characteristics of
"the article, but also denoted the source of manufacture;
"but when the monoply ceased, and the article passed
"into the domain of public property, the name which
"had been its generic designation also passed. Their
"monopoly has ceased to exist in this country as well
"as abroad, and *the property in the name can no more*
"*survive here than it can abroad*" (pp. 432–433).

Judge WHEELER'S *Decision.* Judge WHEELER, sitting at circuit, in dismissing the bill, said: "Rahtjen's com-
"position appears to have become a valuable article of
"commerce, well known by that name throughout the
"maritime world, through Rahtjen's expired English
"patent and his operations under it, so that his name
"in connection with trade in that product is descrip-
"tive of it and not an indication of its origin as from
"him or under his right. The article advertised for by
"the Government in calling for the bids which are
"claimed to be an infringement or unfair in competi-
"tion was this product, however produced, and not the
"product produced by or under him. To bid for fur-
"nishing such a well-known article, by whatever name

" known that would describe it, would not seem to be " actionable according to any established principles of " law " (p. 419).

The complainant, surely, cannot have a trade-mark in this country in a name which is common property everywhere else.

Nor does the Scotch case of Singer Mfg. Co. vs. Kimball, referred to in Judge WHITE'S opinion in Singer Mfg. Co. vs. June Mfg. Co., conflict with the doctrine laid down in the Belgian and German cases, and the opinions of Judges WALLACE and WHEELER, above referred to. That Scotch case which supported the alleged trade-mark in the word " Singer " for a sewing machine, did so *under the belief that the Singer machine was never patented anywhere, and that there was no generic principle which might be termed the Singer principle shown in those machines.*

We quote from the Lord President's opinion in said Scotch case :

" Now, it appears to me that for a series of years, " and certainly, I think, back to the year 1863, as " averred in the petition, everybody in the trade has " understood that a Singer Machine or a Singer Sew- " ing Machine is a sewing Machine manfactured by " the Singer Manufacturing Company. I think that is " the fair result of the evidence. It has hardly been " denied that for that period the fact has been so. But " then reference is made to an earlier period in the " history of the use of this word, as showing that the " meaning thus acquired by the word Singer arose " from false representation made by Mr. Singer and " afterwards by the Singer Manufacturing Company, " or some other Company that preceded them, as to " the right of Mr. Singer, as having a patent or " patents, which enabled him, for a time, at least, ex- " clusively to manufacture what was called the Singer " Machine. Now, no doubt Mr. Isaac Singer, who " appears to be still a partner of this Company, so far

" back as 1852, was under the impression that he had " made an original invention, and he expected to obtain " a patent for it, but in that he was disappointed. It " turned out that the straight needle with the vertical " action, which he conceived to be a novelty invented " by himself, had been anticipated in other Sewing " Machines, and the consequence was that he did not " obtain a patent for that.

" But I am not prepared to say that there is any " evidence in this case to show that either Mr. Singer " or any person associated with him in business com- " mitted any fraud in the way of holding out to the " public that they held patents which they did not " hold. I do not think there is sufficient evidence of " that, or that the use of the word Singer, as appli- " cable to machines made by him and his company, was " caused by their false representations of patent rights " belonging to him. On the contrary, it rather ap- " pears to me the use of the name grew up and ma- " tured just in consequence of Mr. Singer and those " connected with him in business having constantly " gone on making this kind of machine which he " thought originally was a novelty, and improving it in " every kind of way that occurred to them in the " progress of their business. It was in that way, I ap- " prehend, that the name 'Singer' came to have what " is now its established meaning, and I cannot see that " there is anything in the history of that appropriation " of the name to prevent the Singer Manufacturing " Company now from asserting right to it as their " trade-mark. It is said, no doubt, on the part of the " defendant, that to interdict him and all other manu- " facturers of sewing machines from the use of this " name involves a great hardship, *because they cannot* " *otherwise describe what they are perfectly entitled to* " *make in their business, machines upon the Singer prin-* " *ciple.* Now, that statement at first sight is very " plausible, but it seems to me to rest upon a fallacy. " *It assumes that there is* what is called a Singer prin-

" ciple—that is to say, that there are some peculiar-
" ities in the machines made by the Singer Manufact-
" uring Company that are not to be found in any
" other machines, or some combination of these
" peculiarities that is not to be found in other ma-
" chines, and it would be very desirable to ascertain
" precisely what that is before disposing of the argu-
" ment founded upon these assumptions. But I con-
" fess I have looked in vain in the proof for anything
" like a definite or intelligible explanation of what is
" meant by the Singer principle."

(1873) Singer Mfg. Co. vs. Kimball, 11 Cases Ct. of Session, 3 Series, p. 267 (272-3).

The counsel for complainant have insisted that the English or foreign history of the trade-mark should not be considered in this case. Yet the foreign history and status of a trade-mark claimed in this country has been considered by our courts. It was so considered by this Court in the "Hunyadi" cases recently decided.

> In the "Hunyadi" cases, decided last October, this Court considered the *foreign* history of the trade-mark: Saxlehner's discovery of the spring, in 1862; his obtaining permission from the Hungarian authorities, in 1863, to give it the name of Hunyadi Spring; his carrying on an uninterrupted trade under that name until 1872; his registering in Hungary, in 1872, the trade-mark "Hunyadi Janos;" his protest against the grant to Ignatius Markus, to use "Hunyadi Matyas," as a trade-mark for other water, in which he was first successful, but finally defeated; the opening of other springs by competitors under trade-marks of which the words "Hunyadi" formed part; his instituting an unsuccessful suit in Hungary, in 1887, against the use of the words "Hunyadi Josef;" his registration of his labels under the Hungarian law of 1890; and his instituting suits in the following year

against all infringers in Hungary, which finally resulted in the establishment of Saxlehner's right to the name "Hunyadi;"—all these facts were proven in the case, and were considered by this Court, and are recited in its opinion.

It is clear, this Court said, "that the word "became and continued to be for twenty years "public property *in the Kingdom of Hungary*, and "it is difficult to escape the conclusion that it "became so here."

(1900) Saxlehner vs. Eisner & Mendelson Co., 179 U. S., 19.

In Dadirrian vs. Yacubian, the Circuit Court of Appeals for the First Circuit went fully into the foreign history of the word claimed here as a trade-mark. The complainant below had registered the word "Matzoon" as a trade-mark in this country. It appeared conclusively that complainant had remained within the United States in the exclusive and undisturbed possession and use of the alleged trade-mark for about seven years, and that he had in that time not only enjoyed an extensive and valuable trade in connection therewith, but that he had created it so far as this country was concerned. The Court admitted that the facts of the case made a very strong *prima facie* case for the complainant, "so that neither justice to him nor the interests of the public will permit the denial of the relief which he asks, unless legal principles clearly require it." The defense was that the complainant's article of merchandise was a historically and locally well known Armenian healthful beverage, containing certain medicinal qualities of which "Matzoon," or more properly "Madzoon," was the proper Armenian descriptive word.

The Court held that a word which is the common name of an article *in Armenia*, could not be

appropriated as a trade-mark or trade-name by the person who introduced the article and the name into this country.

(1900) Dadirrian vs. Yacubian, 98 Fed. Rep., 872; affirming S. C., 90 Fed. Rep., 812. See, also, case on motion for preliminary injunction, 72 Fed. Rep., 1010.

The complainant contends that its predecessors acquired a common law trade-mark in this country before making the application for the English Patent.

We know of no rule of law laid down in the text books or in the decisions in this country, on this point.

Centaur vs. Heinsfurter. In the case of Centaur vs. Heinsfurter it would seem that the point was raised by the pleadings whether a man having acquired a common law trade-mark prior to the grant of a patent on the article, could not still retain his trade-mark rights after the expiration of a patent. From the statement of facts printed at the head of the case it would appear that, *prior to 1868*, one Pitcher, the predecessor of the complainant *invented* a medicinal compound *and sold* it under the name of "Castoria." *In 1868* he obtained a patent on the formula. After the patent expired the defendant manufactured the article in accordance with the formula, and sold it as "Castoria." The complainant filed a bill asking that the defendant be enjoined from selling its goods under the name of "Castoria." The Court ignored the point raised by the allegation of the acquisition of a common-law trade-mark prior to the grant of a patent, and decided that when the patent expired the right to make the article and to sell it as "Castoria" was open to the world (Centaur Co. vs. Heinsfurter, 84 Fed. Rep., 955).

Batcheller vs. Thomson—The respondent, in their brief below, cited Batcheller vs. Thomson, 93 Fed. Rep., 660, as supporting its contention that, if its predecessors used said trade-mark two and one-half years prior to obtaining the patent, the subsequent expiration of the patent would not affect the trade-mark

rights. That case, however, we submit, does not bear out that contention. The facts of that case are stated by the Court in its opinion: "When Thomson commenced, in Paris and in England, the manufacture of "corsets, they were made in accordance with an alleged "invention of Edward Drucker. Letters Patent of the "United States for this corset were issued in the name "of Drucker on May 7, 1867, but the corsets made "accordingly were unsatisfactory; the alleged inven-"tion was concededly of no value, ceased to be used, "and an improvement was made in England by an "employee of Thomson, which was patented in the "United States on November 30, 1869, to Henry A. "Lyman, assignor to Thomson, Langdon & Co. This "patent expired November 30, 1886. How closely the "corsets of complainant or defendant followed this "improvement did not appear, and, indeed, the dis-"tinctive value which the improvement imparted to "the product did not appear" (see middle p. 663). * * * "The Thomson corset was extensively ad-"vertised, and was a favorite, but whether its value "was connected with the Lyman Patent is unknown" (p. 665). *These facts are very different from those of the case under consideration, where we have an article of intrinsic merit, made under a patented formula, and deriving its value from the formula, and not from the name.*

Upon the above facts the complainant has no trademark in the word "Rahtjen's" and the bill of complaint should be dismissed.

II.

The act of the predecessors of the complainant in disclaiming the exclusive use of the word "Rahtjen" when they applied for the registration of a trade-mark in England, estops complainant from claiming such exclusive right now in this country.

Bearing in mind the forfeiture of the English Patent for Rahtjen's Composition in 1880, and the fact that the name "Rahtjen's Composition" had become public property, we now call attention to the following efforts made by the complainant's predecessors to secure a trade-mark in England:

(1) On June 25, 1883, John Rahtjen filed an application for registration of the words "*Genuine Rahtjen's Composition for Ships' Bottoms*, &c." (Defendant's Exhibit, Cert. Copy Record of Application, Opposition, and Withdrawal of John Rahtjen, No. 32,826 of 1883," pp. 400–402). This was after the English Patent to Rahtjen had been forfeited and after the defendant's predecessors had commenced to make and sell (May, 1883) "Rahtjen's Composition, Holzapfel's Manufacture." M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 401). Rahtjen filed no counter statement, and his application was held to be withdrawn and abandoned (p. 402).

(2) On July 7, 1883, John Rahtjen filed an application for registration of the words "*Rahtjen's Composition*" (Defendant's Exhibit, Cert. Copy Record of the Application, Opposition, and Withdrawal of John Rahtjen, No. 32,951 of

1883," pp. 397–399). This was after said English Patent had been forfeited and after the defendant's predecessors had commenced to make and sell "Rahtjen's Composition, Holzapfels Manufacture." M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 398). Rahtjen filed no counter-statement, and his application was held to be withdrawn and abandoned (p. 399).

(3) On June 28, 1883, Suter, Hartmann & Co., filed an application for registration of the words "*Rahtjen's Patent Composition*, for Ships' Bottoms, Buoys, &c. None genuine without this signature. Suter, Hartmann & Co." ("Defendant's Exhibit, Cert. Copy Application, Opposition, and Withdrawal of Suter, Hartmann & Co., No. 32,858, of 1883," pp. 402–405). This was after the English Patent to Rahtjen had been forfeited, and after the defendant's predecessors had commenced to make and sell "Rahtjen's Composition, Holzapfel's Manufacture." M. Holzapfel & Co., through their solicitors, filed a written notice of opposition to the registration sought (p. 403). Suter, Hartmann & Co. filed no counter statement, and their application was held to be withdrawn and abandoned (p. 404.)

(4) On January 9, 1884, Suter, Hartmann & Co., filed an application for registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. Directions. Suter, Hartmann & Co." ("Defendant's Exhibit Cert. Copy, Suter, Hartmann & Co.'s Application for Trade-mark 39,919 of 1884," pp. 406–407); and in their application appears this disclaimer: "*We do not claim the exclusive use of the words 'Rahtjen's Patent Composition for Ships' Bottoms, Buoys, etc. Directions,' or any of such words, except as part of the combination constituting our trade-mark, as represented annexed, and to which we claim exclusive right*"

This is a *full disclaimer of any exclusive right to the words "Rahtjen's Patent Composition,"* or any of those words except when accompanied by all of the other words above quoted; and the defendant has never used said combination of words.

Where the plaintiff has disclaimed the exclusive use of "W. R." as a trade-mark, to be stamped on goods, held, that he could not restrain the defendant from using the letters "W. R." on the same class of goods.

(1892) Rosenthal vs. Reynolds, 61 L. J. Ch., 508.

So, when the applicant for registration of a trade-mark, restricted himself in his application to a *red* anchor, the Court refused to recognize his claim to the unlimited use of the anchor emblem. The Court said: "He thereby gave public notice to all traders and others in the United States, that he adopted as his trade-mark for medical compounds, not the representation of an anchor generally, but a red anchor in a white oval space or field. This limited registration was a very deliberate act of the plaintiff, and he must abide the consequences. It would be a perversion of the right of registration under the Act of Congress, of which the plaintiff availed himself, and would amount to a fraud on other traders to permit the plaintiff now to *assert broader rights* in the anchor as a trade-mark symbol than his public registration in 1885 disclosed."

(1892) Richter vs. The Anchor Remedy Co., 52 Fed., 455.

III.

The name "Rahtjen's Composition" has long ceased to denote the source of manufacture, and has become the generic description of the article.

The Complainant Company has always been particular to give prominence to, and has always advertised, that the "Rahtjen's Composition" sold by it was of "Hartmann's Manufacture," and that the said goods were to be distinguished from those manufactured by others not by the words "Rahtjen's Composition," but by the "Red Hand" brand (pp. 410–412).

The evidence shows that said company always sold said composition as "Hartman's Rahtjen's" or "Hartmann's Manufacture" (p. 21, x-Q. 60). And the drums in which it was sold bore the representation of a "*Red Hand*" with the words "Trade" on one side and "Mark" on the other side thereof.

Had complainant and its predecessors relied upon their alleged right to the exclusive use of the word "Rahtjen's" as a trade-mark or trade-name, which protected said composition of their manufacture, they would not have taken out the "Red Hand" trade-mark, nor would they have affixed the words "Hartman's Manufacture" (for why should the manufacturer identify his name with it, if there was only one, and could be only one, Rahtjen's Composition?), nor would they have disclaimed the exclusive right to the word "Rahtjen's" in their application for English registered trade-mark No. 32,194 (p. 408).

The testimony in this case, of disinterested witnesses, familiar with maritime matters, is to the effect that the maritime world understood "Rahtjen's Composition" to be a *kind* of paint, and not the paint of any particular source of manufacture (see testimony of Schnitger, p. 297, Q. 67; Nicholl, p. 313, Q. 11; Howden, p. 344, Q. 10; Stephens, p. 351, Q. 11).

The Belgian decision (p. 358) held that the name "Rahtjen" had long ceased to denote the source of manufacture.

The German decision (pp. 364, 372) held likewise.

There are two exhibits in this case, to which particular attention is called, as showing that both the English and the United States Governments, respectively, in calling for supplies of Rahtjen's Composition, *recognize it not only as a generic thing, but as having a widely-known common formula, by whomsoever manufactured.* These exhibits to which we refer, are the letter from the Royal India Office (pp. 416, 417) and the U. S. Government proposal for bids (p. 18) and U. S. Government Requisition (p. 51).

In the letter from the Royal India Office, the defendant company is informed that its name has been placed on the *list of contractors* to that department for the supply of Rahtjen's composition. It was also notified that it would be required to supply it in *accordance with the departmental standard* (p. 417, 418).

In the U. S. Government proposals and requisitions, the contractors are notified that the "Rahtjen's" to be furnished is *subject to usual inspection* at the navy yard (p. 51).

Furthermore, that the paint became known under a generic designation, and had no reference to the source of manufacture, is shown by the action of the complainant in this case in printing and painting on and about its goods the words "Hartmann's Manufacture" (p. 52*a*, 52*b*), thus unqualifiedly recognizing that there were different manufacturers and sources of the generic thing known as "Rahtjen's Composition."

As was said, in deciding this case, by the learned Judge at Circuit:

> "Rahtjen's composition appears to have become
> "a valuable article of commerce, well-known by

" that name throughout the maritime world,
" through Rahtjen's expired English Patent and
" his operations under it, so that his name in con-
" nection with trade in that product is *descriptive*
" *of it*, and not an indication of its origin as from
" him, or under his right. The article advertised
" for by the Government, in calling for the bids
" which are claimed to be an infringement or un-
" fair in competition, was this product, however
" produced, and not the product produced by or
" under him. To bid for furnishing such a well-
" known article, by whatever name known that
" would describe it, would not seem to be action-
" able according to any established principles of
" law " (p. 419).

And Judge WALLACE, writing the dissenting opinion in the Circuit Court of Appeals, says *(inter alia)* :

" Irrespective of the effect of the patent, the
" designation has become *publici juris* through its
" long use by dealers in the article which it de-
" scribes, and whether this is attributable to the
" acquiescence of the complainant and its prede-
" cessors, or to their laches, is immaterial, since
" their conduct, active or passive, has led to the
" result.

" One test by which to determine whether a
" word which was originally a trade-mark has be-
" come *publici juris* is whether the use of it by
" persons other than the original owner is still
" calculated to mislead the public and induce them
" to buy goods not made by the original owner, upon
" the supposition that they are his goods. When-
" ever the same has come to be so generally un-
" derstood by the public dealing in the article, as
" denoting the article itself that nobody can be
" deceived, by the use of it, into the belief that
" it was made by any particular person, the right

" to it as a trade-mark is gone (Ford v. Foster,
" L. R., 7 Ch. App., 611). If that test is applied
" to this case, there can be no doubt the name is
" no longer a valid trade-mark " (p. 433).

In the case of the Elgin National Watch Co. vs. Illinois Watch Co., this Court, speaking of a trade-mark, said :

" The term has been in use from a very early
" date, and, generally speaking, means a distinc-
" tive mark of authenticity, through which
" the product of *particular manufacturers*, or the
" vendible commodities of *particular* merchants,
" may be distinguished from those of others."

(1901) Elgin National Watch Co. vs. Illinois Watch Co., 179 U. S., 665 (673).

In the recent controversy over the use of the words " The Edison Phonograph Agency," the U. S. Circuit Court for the Eastern District of Pennsylvania held that the word " Edison," as applied to phonographs, was merely *descriptive* of the article, and meant only that the phonograph was invented by Edison.

(1901) Edison vs. Hawthorne, 106 Fed. Rep., 172.

" Rahtjen," then, has long ceased to denote the source of manufacture of this paint, or to indicate the name of the vendor, and has become merely the generic description of the article itself.

IV.

There has been no unfair competition.

The case is quite clear from all wrongful intent, or wrongful imitation or simulation, or deception of the public.

Rahtjen's composition, Judge WHEELER held, "became a valuable article of commerce, well known by that name throughout the maritime world through Rahtjen's expired English Patent and his operations under it, so that his name in connection with trade in that product is descriptive of it and not an indication of its origin as from him or under his right" (p. 419). That being so, the defendant had the right to use the name "Rahtjen's Composition," provided it did not represent it to be the manufacture of some other person or company. This it has always conscientiously avoided.

The defendant and its predecessors in interest have always taken special pride in representing that the composition in question was *their manufacture*. They have invariably used their *own name* as manufacturers of it, in connection with it. Special attention is called to "Defendant's Exhibit Holzapfel & Co.'s Circulars, Advertisements, Letter Heads, etc." (extracts from which are printed on pp. 414–416), and also to the "Defendant's Agents' Letter Heads, Estimate Blanks, Advertisements, Cards, etc." (printed on pp. 417–419), in which invariably the composition is expressly stated to be *made according to the patent*, or else by the words "Rahtjen's Patent" Composition (the first two words in quotation marks, which, as the Brussels Court held, conveyed no other meaning than that the composition recommended was manufactured in accordance with "Rahtjen's Patent").

In addition, the markings on the drums in evidence show the importance the defendant places on its own name as manufacturer.

In addition, the defendant marks said composition with its own trade-mark of a red propeller.

The receipted bill ("Complainant's Exhibit Defendants' Bill," p. 52) for the composition purchased by complainant of the defendant, and on which the suit is brought, shows the red propeller, and describes the article sold as the defendant's manufacture.

And both the Circuit Court and the Circuit Court of Appeals have decided there was no unfair competition on the part of the defendant.

V.

The complainant having stood silently by for very many years and allowed the defendant's predecessors to build up an established business in "Rahtjen's Composition," and the business having been subsequently incorporated with a large capital and numerous stockholders, is forever estopped from enjoining or interfering with the petitioner's use of the word "Rahtjen's."

This is not a case of *actual fraud* in which the doctrine of laches has but an imperfect application. The defendant throughout has acted in good faith, and under its legal rights as it understands them. There has been no imitation of labels and no unfair competition in trade. Everything the defendant has done has been done openly and in good faith.

The complainant and its predecessors in business have known for the past sixteen years that the defendant and its predecessors in business were making and selling openly and notoriously a composition for ships' bottoms under a name of which the word "Rahtjen" formed part. This was well known to the founders and directors of the English or parent company, from whom the complainant company derives its rights (if any), and who are also directors and owners of the majority of the capital stock in the complainant company.

The defendant and its predecessors have continuously, since 1883, advertised its Rahtjen's composition extensively, and have spent from £1,500 to £1,800 for such purpose annually (p. 269, Q. 69), and built up an active competition with the complainant and its predecessors, and finally outstripped them. The testimony is undisputed that the defendant's business in these composition paints for ships' bottoms is to-day larger than that of any other company of the like nature in the world (p. 280, Q. 157; p. 331, Q. 63; p. 332, x-Qs. 68, 69).

Thus, from 1883 to the present time, the defendant or its predecessors, *acting in good faith* and on what we submit was its legal rights, has been continuously, openly and notoriously supplying quantities of "*Holzapfel's* Rahtjen's Composition" in England, in Europe and abroad, and in the United States. During that time its business in these paints has grown until now it is the largest one of its kind in the world. During that time from a partnership it has grown into a large and wealthy corporation, with many new parties in this country and abroad interested therein as stockholders, and the value of its property, of which the paint in question forms part, has, owing to its exertions and expenditure of money in advertising and pushing the same, immensely increased. During all this period of 16 years the complainant and its predecessors, with full knowledge of the facts, stood silently by without any assertion of its alleged rights and without even a notice or protest to the defendant.

John Rahtjen admits that he was aware, at the time he applied for a registration of his alleged trade-mark in England, in 1883 (which application was successfully opposed by defendant's predecessors), that defendant's predecessors were then using on their paint the alleged trade-mark or trade-name in question (p. 143, x-Qs. 401-404), and that defendant's predecessors and defendant have since continued to do so.

WILLIAM HARTMANN, of Suter, Hartmann & Co. (predecessors of complainant), also knew of such use. He says he knew of it soon after Holzapfel & Co. had commenced business (p. 68, x-Qs. 135–137). He was shown the circular of M. Holzapfel & Co., dated April 17th, 1883 (Defendant's Exhibit Holzapfel & Co.'s Circulars, Advertisements, Letter Heads, &c.) in which Holzapfel & Co. announce that they are making and selling a Rahtjen composition, according to the specification of the Rahtjen Patent, and he says he saw that notice about the time it bears date; to wit, April 17, 1883 (p. 81, x-Qs. 288½ and 289). Moreover, it is matter of record that the 1883 application of his firm of Suter, Hartmann & Co., for registrations of said alleged trade-marks was successfully opposed and defeated by Holzapfel & Co., the defendant's predecessors.

Suter, Hartmann & Co. were afterwards turned into the Suter, Hartmann and Rahtjen's Composition Company. This company is largely interested in the Rahtjen's American Composition Company (the complainant), the latter being an offshoot of the parent company in England (p. 81, x-Q. 290). These predecessors of the complainant in the ownership of the alleged trade-mark were also its predecessors, in the business it is now carrying on. The sixteen years' laches in England of its predecessors is, therefore, pertinent in the case. The complainant took said alleged trade-mark by assignment from assignors, who had for sixteen years been guilty of laches in the assertion of their alleged monopoly. The complainant stands in the place of such predecessors, and took the assignment of the alleged trade-mark, subject to legal consequences of the assignors' laches for sixteen years.

The defendant and its predecessors sold "Rahtjen's Composition, Holzapfel's Manufacture," in the United States continuously ever since they began in 1883 to make and sell it in England. At this long interval of time it has been impossible to get competent evidence

of the first knowledge of the agents in this country of complainant's predecessors.

But, Clark, a witness for the complainant, who was called to prove that his deceased father was agent in New York City from 1886 to 1888, inclusive, for the Rahtjen's composition of complainant's predecessors, and that he (the witness) was in such agent's employ at that time, says that he knew Donald & Co. to be the agents in New York City of Holzapfel's Rahtjen's Composition twelve or thirteen years ago (p. 163, Qs. 22, 24). He had a conversation with Donald about it, and it was cross-examined as follows:

"Re-x-Q. 32. When Mr. Donald solicited you to buy "the Rahtjen's Composition made by Holzapfel, was "not what he told you as follows: That it was made "according to the same formula as the Rahtjen's Com- "position, which you were familiar with?

"Same objection as to x-Qs. 20, 21, 23 and 24.

"A. Yes, sir; that was his idea of it.

"Re-x-Q. 33. You knew at the time, did you not, "that the Rahtjen's Composition, Holzapfel's Manu- "facture, which Mr. Donald solicited you to buy, was "not made by the same firm or manufacturer who "made the Rahtjen's Composition with which you were "familiar?

"Same objection.

"A. Well, being different firms, no; I never thought "it was the same people who were manufacturing the "paint.

"Re-x-Q. 34. And you did not intend in your testi- "mony to be understood that Mr. Donald represented "to you that it was the same people who were making "the paint?

"A. No; the same formula.

"Re-x-Q. 35. You knew then that there were two "rival establishments making the paint, but understood "that the paint made by both were from the same "formula?

" A. Mr. Donald gave me to understand that " (p. 164, Re-x-Qs. 32–35).

Various other witnesses in the United States have testified to the continuous competion for orders for Rahtjen's composition, between the defendant and the complainant, and it was well known in the shipping circles of this city for twelve years past that there were two Rahtjen's compositions for sale, viz., *Hartmann & Co.'s* Rahtjen (for sale by Petersen) and *Holzapfel's* Rahtjen (for sale by Donald & Co.).

See testimony of:

Coverly, a clerk in the office of Henderson Bros. (p. 244, Qs. 8–10).

Haffner, chief clerk for Bowring & Archibald (p. 247, Qs. 11–19).

Orington Linnekin, superintendent of the New York Dry Dock and Repair Co., East River, N. Y. (p. 249, Qs. 8–14).

Oswald Miller, superintendent for R. W. Cameron & Co. (p. 255, Qs. 11–13 ; p. 256, x-Qs. 22–27).

John Adair, superintendent of the Tweedy Trading Co. (p. 251, Qs. 11–16 ; p. 252, Q. 21). Adair also knew of the Rahtjen Composition made by Holzapfel's in England years ago.

" Q. 28. You can state any prior instance to the " painting of the ' Aguan,' where you have had per- " sonal dealing or transaction with Rahtjen's Compo- " sition, Holzapfel's Manufacture ?

" A. I had it put on a steamer at Newcastle, Eng- " land, about thirteen years ago ; thirteen to fourteen ; " I am not sure as to the date.

" Q. 29. Do you mean that you had a steamer " painted with it at Newcastle, England ?

" A. Yes.

" Q. 30. Do you remember the name of the steamer?

" A. ' Totomo Maru.'

" Q. 31. Do you remember any other instances " when you had any dealing in Rahtjen's composition, " Holzapfel's Manufacture ?

"A. Yes.

"Q. 32. You may state what?

"A. At the same time I took out a consignment to "Japan.

"Q. 33. You mean a consignment of Rahtjen's "Composition, Holzapfel's manufacture?

"A. Yes.

"Q. 34. What did you do with the consignment "when you arrived in Japan?

"A. Sold it to the Japanese Government" (p. 253, Qs. 28-34).

Mr. Andresen, assistant manager of defendant's office in New York City, cites an instance to show that Mr. Petersen, the agent for the complainant's predecessors (and the now president of the complainant corporation), knew that Donald & Co. were selling "Rahtjen's Composition, Holzapfel's Manufacture," at least as early as 1891 (p. 217). Mr. Petersen himself admits that he knew Donald & Co. were advertising "Rahtjen's Composition, Holzapfel's Manufacture," at least as early as 1892 or 1893, and that his company made no objection or protest (p. 29, x-Qs. 140-145). He saw their advertisement in the "Maritime Register" in 1893 (p. 36, x-Q. 209). He also heard rumors from abroad, and from his own agents, that defendant's Rahtjen paint was offered in the market (p. 37, x-Q. 227), and that he had in mind the defendant company when he issued the circular in 1893 (p. 39, x-Q. 246).

Was this "easy indifference" of the complainant and its predecessors commendable? Was not the course of conduct of the complainant and its predecessors during these 16 years directly to encourage the defendant and its predecessors in the use of the alleged trade-mark? Is the complainant at this late day, and in view of the changes which the lapse of time has wrought, entitled to any relief in this Court? Such undue and unexplained delay under the circumstances, we respectfully submit, renders it inequitable to grant an injunction.

The cases are many in which this defense of laches has been invoked and considered. It is true that by reason of their difference in facts, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper form ; that, by reason of his delay, the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned, and that, because of the change in condition during this period of delay, it would be an injustice to the adverse party if the stale claim were now permitted to be enforced.

In Mackall vs. Casilear, 137 U. S., 556, this Court said :

> " The doctrine of laches is based upon grounds
> " of public policy which requires for the peace of
> " society the discouragement of stale demands.
> " And where the difficulty of doing entire jus-
> " tice by reason of the death of the princi-
> " pal witness or witnesses, or from the origi-
> " nal transaction having become obscured by
> " time, is attributed to gross negligence or
> " deliberate delay, a court of equity will not aid a
> " party whose application is thus destitute of
> " conscience, good faith and reasonable diligence."

In Hammond vs. Hopkins, 143 U. S., 224, 250, this Court said :

> " No rule of law is better settled than that a
> " court of equity will not aid a party whose appli-
> " cation is destitute of conscience, good faith and
> " reasonable diligence, but will discourage stale
> " demands, for the peace of society, by refusing to
> " interfere where there have been gross laches in
> " prosecuting rights, or where long acquiescence
> " in the assertion of adverse rights has occurred."

In Abraham vs. Ordway, 158 U. S., 416, this Court said :

> " One of the grounds upon which courts of " equity refuse relief where the party is guilty of " laches is the injustice of imposing upon the de- " fendant the necessity of making proof of trans- " actions long since past in order to protect him- " self in the enjoyment of rights which, during a " considerable period, have passed unchallenged " by his adversary, with full knowledge of the cir- " cumstances."

This principle of equity jurisprudence is, of course, applicable to patent and trade-mark suits, and has been followed by the Circuit Court of Appeals in the following well-known cases :

In Prince's Metallic Paint Co. vs. Prince Mfg. Co., a purchaser on foreclosure of a property and business which had long been conducted in connection with a trade-mark, continued to use the trade-mark, with full knowledge of the former owner, for eight years without objection. The Court said :

" In courts of equity the rule is to withhold re- " lief where there has been unreasonable delay in " prosecuting a claim, or long acquiescence in the " assertion of adverse rights. Again and again it " has been judicially decided that nothing can call " into activity a court of equity but conscience, " good faith and reasonable diligence. In " McLaughlin vs. Railway Co., 21 Fed., 574, Judge " BREWER held a bill for infringement of a patent, " alleging use and construction of a patented in- " vention for 13 years without stating an excuse " for the plaintiff's delay in suing, to be demur- " rable. Laches for even less than the statutory " period of limitations, aided by other circum- " stances, will bar a right (Ashhurst's Appeal, 60

" Pa. St., 290). In Lewis vs. Chapman, 3 Beav.,
" 133, the Master of the Rolls refused an injunc-
" tion to restrain the infringement of a copyright
" solely on the ground of six and a half years' de-
" lay, where there was knowledge of the com-
" mencement and prosecution of the defendant's
" publication. Long acquiescence before filing a
" bill for an injunction, with full knowledge of the
" infringement, is deemed laches equivalent to a
" breach of good faith (Brown, Trade-mark, § 497).
" Hence in Manufacturing Co. vs. Garner, 55
" Barb., 151, a delay of nine years in applying for
" an injunction to restrain infringement of a trade-
" mark was held to be a good cause for refusing
" it." The bill in the above case was dismissed.

(C. C. A., Sept., 1893.) Prince's Metallic Paint Co. vs. Prince Mfg. Co., 57 Fed., 938 (944) ; affg. s. c., 53 Fed., 493.

In La Republique Francaise vs. Schultz the defendant had for 30 years manufactured and sold " Vichy water," during which period his said business had grown to a large and profitable one. He always associated his name with his product, and advertised it as " Schultz's Vichy Water " (just as the defendant in the present suit has always advertised its product as " Holzapfel's Rahtjen's Composition " or " Rahtjen's Composition, Holzapfel's Manufacture "). Judge WALLACE, in deciding this case at circuit, said :

" Equity is indisposed to assist parties who
" have slept upon their rights and acquiesced in
" their appropriation by others for a great length
" of time. The unexampled delay and acquiescence
" in the present case, I think, should defeat the
" action." The bill was dismissed.

(C. C., May, 1899.) La Republique Francaise vs. Schultz, 94 Fed., 500 (since affirmed by the Circuit Court of Appeals).

In Starrett vs. Stevens Arms and Tool Co., it appeared that the complainant was aware ten years before bringing suit that the defendant was manufacturing and selling the alleged infringing device, and that at that time complainant had a correspondence with defendant in reference to the proper construction of complainant's patent and alleged infringing device made by defendant, but did nothing more to pursue his claim for the following ten years, during which time defendant continued to manufacture the alleged infringing device, and built up a large and profitable business therein.

(The present case is even stronger than this, since no claim or demand was made by the complainant or its predecessors on the defendant or its predecessors before suit was brought, 16 years after the alleged infringement commenced.)

The Court said :

> " It would operate as a great injustice at this
> " late day to interfere with an established business
> " conducted under an open claim of right for so
> " many years. The laches in this case are such as
> " to debar not merely the claim for profits, but
> " any claim to the interposition of a Court of
> " equity ; " and the bill was dismissed.
>
> (C. C., July, 1899.) Starrett vs. Stevens Arms & Tool Co., 96 Fed., 244.

In Richardson vs. Osborne & Co. the complainant for about fourteen years witnessed the infringement of his patent by the defendant, during which time the defendants expended time and money in building up their business. The Circuit Court of Appeals, in deciding the case, said :

> " The complainant says he sent notices to the
> " manufacturers, and, among others, to the de-
> " fendant corporation, in the latter part of 1883,
> " and met the president in Lake City by appoint-

" ment in January, 1884. He says: 'We had
" ' some conversation. He asked what our claim
" ' was. He was told it was on the combination.
" ' We talked together perhaps fifteen minutes
" ' pleasantly.' In May, 1890, an action at law
" was brought against the Minneapolis Harvester
" Works, which was compromised before trial, in
" September, 1891, by the payment of money and
" a release by the complainant. He did not tell
" how much money was paid or whether it was
" in recognition of the validity of the patent.
" For aught that appears, all that the defendant
" did was to pay a trifling sum to be free
" from a lawsuit. No other proceedings
" were instituted until the present suit. The
" only thing which can be during the entire
" history of the invention characterized as an
" active exercise of ownership was the Minneapolis
" suit, and its outcome is so vague and shadowy
" that it cannot be told whether it was a successful
" or an abandoned attempt to sustain the patent.
" The continued refusal or neglect of the joint
" owners to impart life to it was so manifest, that
" a Court cannot look with favor upon the present
" attempt to gain money from manufacturers who
" invested in the effort to supply the demands for
" the Appleby machines, under the belief that it
" infringed no patent, a belief which the conduct
" of the owners of the Fowler Patent encouraged."
The decision below dismissing the bill for laches was affirmed.

(C. C. A, Apr. 1899). Richardson vs. Osborne & Co., 93 Fed., 828, affirming, s. c., 82 Fed., 85.

In the present suit (whether we consider the 16 years in England or the 12 years in the United States, of the uninterrupted use of the alleged trade-name, by the defendant or its predecessors) there was such in-

excusable laches that the decree of the Circuit Court dismissing the bill of complaint, should have been affirmed by the Circuit Court of Appeals.

VI.

The Rahtjen Company's petition for a cross writ of certiorari.

The complainant, in the Courts below, viz., Rahtjen's American Composition Company, have filed a petition for a writ of *certiorari*. This is for the purpose of reviewing so much of the decision below that declines to award them an accounting.

Upon all the foregoing facts, and in view of the decision of every Judge before whom this case has come declining to grant an accounting, we confidently submit that said petition will be denied.

Conclusion.

We respectfully urge upon the Court that this case partakes of an international and public interest, not only affecting the whole maritime world, but being of especial interest to the Government of the United States. It is in evidence on the record, as the Court will see, that the complainant admitted, by the witness Petersen (Record, p. 33, x-Qs. 187–190), that the main reason for bringing suit was the successful competition and underbidding by the defendant in the matter of price for this paint for the Navy Department. In this respect the Government of the United States is an

interested party in this case, in the efforts of the defendant to break down a monopoly, secure healthful competition and lower prices to the great benefit of the Government. The case is also of great international interest, as if the present decision be allowed to stand, it will make an article of prime necessity in the shipping world, a monopoly in the United States, while subject to free competition in every other country. If the decision of the Circuit Court of Appeals stands, while it will be legal for anyone to sell under the brand of "Rahtjen" a paint for ships' bottoms in Great Britain and elsewhere in Europe, the same paint with this brand on it cannot be obtained in the United States unless by paying tribute to the monopoly which will result from the present decision. What will be lawful and proper in the whole shipping world outside of the United States, will be prohibited here. An article in which the name is part of the thing itself, woven into the very fibre of its existence, will here become an exclusive property under that monopolistic form which is odious to the law, while free as air to the use of every one outside the jurisdiction of this Court.

It is respectfully submitted that the case be remanded to the Court below with instructions to affirm the decree of the Circuit Court dismissing the bill of complaint.

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Supreme Court of the United

OCTOBER TERM, 1900.

No. 267

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

against

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Supplemental Brief for Petitioner.

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C. G. Burgoyne, Walker and Centre Streets, N. Y.

10926

Supreme Court of the United States.

HOLZAPFEL'S COMPOSITIONS COMPANY, Limited,
Petitioner,

AGAINST

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

October Term, 1900.
No. 267.

Roughly stated, the propositions contended for in the oral argument, to which the respondent's supplemental brief is a reply are as follows :

First. That even if the goods imported from Germany to be sold here by Gelien were marked " Rahtjen's Composition "—which we do not admit—they were manufactured in that country and marked there by the manufacturers who resided there, and, therefore, the trade-mark—if there was one—was foreign and not domestic ; that Gelien never placed any mark on the goods to indicate their origin or to distinguish them from like goods sold by others, or made any attempt to establish a trade-mark here ; that the " show card " issued by him was not a trade-mark but a mere advertisement, and was never attached to the goods ; that no matter whether the trade-mark—if

there was one—which was on the goods when sold here was foreign or domestic, it was discontinued and permanently abandoned in 1877, when Rahtjen ceased to make shipments to Gelien; and that after that date, all goods shipped to this country were manufactured in England and marked there during the life of the patent and afterwarks by Suter, Hartman & Company and their successors in the manner to be hereinafter stated.

Gelien's deposition was taken by respondent, but he was not asked to state, and did not state, how a single package sent to him for sale was marked (R., 165). His invoices, however, were filed, and were exhibited on the oral argument. They show that the words "Rahtjen's Composition" were not used in a single instance during the whole period from 1871 to 1877. It was always "Composition Paint" except once, and then it was "Pat. Composition." In his letter to Rahtjen dated January 27, 1877 (R., 117), he speaks of it simply as "Composition," and in his letter to Suter, Hartmann & Company of February 27, 1875 (R., 191), he twice calls it "Rahtjen's Patent Composition."

The depositition of John Rahtjen was also taken by the respondent, and on cross-examination he was asked:

"Q. When did you change your stencils from those berring the words 'Rahtjen's Composition' to those bearing the words 'Rahtjen's Patent Composition?' A. I do not remember.

"Q. Was it about the time that the Heinrick Rahtjen patent was issued? A. It may be; I don't remember. It was quite immaterial to us whether 'Rahtjen's Patent Composition' was on the casks or

packings, or 'Rahtjen's Composition,' if only those two words appeared in them."

R., 149.

Again, when speaking of certain casks which he had personally examined, he was asked:

"Q. Are you sure that the stenciling on that cask was 'Rahtjen's Composition?' A. It was either 'Rahtjen's Patent Composition,' as long as we had the patent, or 'Rahtjen's Composition' afterwards.

"Q. But you do not remember which it was, as a matter of fact, on that cask or keg? A. During the time the patent was in existence we used the word 'Patent,' and we dropped it afterwards. That is what I remember of it.

"Q. I am asking you now, however, in regard to your recollection of that visit when you made an inspection of the contents of this drum or cask or both; and I am asking you whether you remember that the words on that cask were simply 'Rahtjen's Composition' or whether they might have been 'Rahtjen's Patent Composition'? A. Well, I did not make any difference; I did not know any difference" (R., 151).

Again, he was asked:

"Q. How were the barrels or casks of Rahtjen's Composition marked that were sent to Gelien and Hartmann, Le Doux & Maecker by you? A. Those to Gelien on the one side with 'H. G.' and the number and 'Hoboken', and on the other side 'Rahtjen's Composition' or 'Rahtjen's Patent Composition'; and those to Hartmann, Le Doux & Maecker on one side 'H., Le D. & M., New York', and on the other side 'Rahtjen's Composition' or 'Rahtjen's Patent Composition'."

The English Patent was dated November 29, 1873, and in 1875 Rahtjen himself commenced the manufacture in that country, but he continued to furnish Gelien from the German factory until the beginning of the year 1878, and on the 15th of January in that year he gave Suter, Hartmann & Company of London the exclusive right to sell in the United States (R., 198). See also Hartmann testimony hereinafter quoted showing how Rahtjen marked his goods in Germany before and during the year 1871. There can be no doubt, we think, that from 1871 to 1878 the goods sent to this country for sale, if marked at all, were marked "Rahtjen's Patent Composition," which was a fraud upon the public and could not establish a valid trade-mark. The motive of the manufacturer or vendor in so marking them is immaterial. The public here naturally supposed that the manufacture and sale of the article were protected by a United States Patent, and a monopoly was thus secured which gave the article a reputation and value in the market. The Court below therefore was in error when it found, as matter of fact, that a valid trade-mark had been established in the United States prior to 1880.

Second. That no valid trade-mark was acquired in England by Rahtjen or by Suter, Hartman & Company before the patent was procured, and that therefore no trade-mark existed in that country after the termination of the patent, November 29, 1880, unless it was lawfully acquired there after that date; that such trade-mark, if any was lawfully acquired there after that date, which included the word "Rahtjen," was qualified and restricted by an express dis-

claimer of the exclusive right to use that word; that this qualification and restriction constituted an inherent part of the trade-mark itself and limited its effect in every country where it is relied upon as a protection; that from the termination of the patent in 1880 up to 1883 no mark was used in England on the goods shipped from that country except "Rahtjen's Patent Composition;" and after April 25, 1883, the only mark which the manufacturers and vendors had the exclusive right to use was that registered by Hartmann Brothers containing the words "Genuine Composition" with the red hand and "Hartmann's Manufacture."

Was a valid trade-mark acquired in Great Britain before the date of the patent? On this point the testimony of Hartmann, respondent's chief witness, is conclusive. We quote from his testimony:

"Q. I show you plaintiff's Exhibit V. Please examine the same and state what it is? A. It is a label of 'Directions for use' that we used *from the very outset of our career* as sole consignees for Rahtjen's Patent Composition. It bears my signature, 'None 'Genuine without this signature. Suter, Hartmann & 'Company.'

* * * * * *

"Q. What use was made of those labels, if you know? A. *They were put on the packages* that were sent to our different agents and customers.

"Q. By whom were those labels affixed to the packages? A. In the outset we sent them to Rahtjen when he manufactured the paint for us in Germany, and subsequently when Mr. Rahtjen made the paint for us in England they were sent to him to be put on the packages.

" Q. How long were the labels, such as the sample in evidence, used to mark the goods sold by your firm, if you know ? A. For several years."

The witness was then shown a circular (Exhibit W), and was asked the following questions :

" Q. What is the matter on the third page of the circular ? A. Directions for use for No. 1 and No. 2 and No. 3.

" Q. Of what, if anything, is the matter on page 3 in substance a copy ? A. Of the labels that were put on the packages.

" Q. State what use was made of the circular which you have produced ? A. It was sent to our different clients, and also agents, to make use of it, and the signature denotes that we were particular to uphold the name of Rahtjen as an additional element of security against bogus imitations.

" Q. As I understand, substantially, the subject matter of page 3 was used in the form of labels, and sent to Mr. Rahtjen, and by him affixed to the packages imported by you ? A. Yes.

* * * * * *

" Q. State whether or not this way of designating Rahtjen's compositions *was employed in Germany at the time you took the agency ?* A. It was.

" Q. Then this was in effect a copying of his method of describing it ? A. It was (R., pp. 60, 61).

* * * * * *

" Q. Referring to Plaintiff's Exhibit V, when did you first see those labels ? A. In January, 1871, or at the commencement of Suter, Hartmann & Company.

* * * * * *

" Q. How long did you use those labels ? A. For many years.

"Q. Up to about what time? A. I cannot tell the time or the number of years we had them in use, but they were *in constant use*, and great care was taken that they should be used, as we thought it an extra security for the name of Rahtjen to prevent spurious and bogus imitations.

"Q. Did your firm of Suter, Hartman & Company attach these labels to the casks, barrels and the like containing the composition, or did some other firm attach them? A. Mostly we did ourselves, and some were also sent over to Germany when we imported the composition from Germany and were attached to the packages there" (R. pp. 72, 73).

The label which was attached to the goods, and the circular referred to as Exhibits V and W, are printed on pages 192–194 of the Record, and they leave no room for doubt as to the markings actually used on the packages by Suter, Hartmann & Company from the very beginning of their business in England, and by Rathjen in Germany at the time they took the agency in 1871. The label put on the goods was "Rahtjen's Patent Compostion," etc., etc., and the circular which was issued in Januaay, 1871, at the same time the label was copied from the German label, had a heading in the same words, and announced to the public that the firm had been appointed "sole agents in the United Kingdom for the sale of the Above-Named Patented Compositions." In addition to all this evidence, certain bills for paints sold by Suter, Hartmann & Company, dated October 5, 1871, February 9, 1872, and February 10, 1872, were produced by the witness Hartmann, all of which describe it as "Rathjen's Patent Composition" (R., pp. 183-4).

This evidence and much more containted in the rec-

ord, shows that the article was falsely represented in England and Germany to be protected by a patent during the years 1871 to 1873, before the patent was actually obtained or applied for, and it shows the character of the marks put on the goods sent by Rahtjen from Germany to the United States during the same period, as well as the goods sold in England and sent to the United States by Suter, Hartmann & Company during the life of the patent and after it expired. It is not necessary to make an argument or cite authorities to show that trrade-marks can not be acqnired in this fraudulent manner.

The use of this false mark was continued all through the life of the patent and until 1884, when Suter, Hartmann & Company registered " Rahtjen's Patent Composition " in England, but expressly disclaimed the exclusive right to the use of the word " Rahtjen." In their application for this mark they swore that they had used " Rahtjen's Patent Composition " since about a year and a half before August 13, 1875 (R., p. 407). In June and July, 1883, John Rahtjen made two applications for the registration of trade-marks, one for " Genuine Rahtjen's Composition," and one for " Rahtjen's Composition." Both were opposed by M. Holzaphel & Company and both were abandoned (R., pp. 398–400). On June 28, 1883, Suter, Hartmann & Company applied for the registration of " Rahtjen's Patent Composition for ships' bottoms, buoys, etc. None genuine without this signature. Suter, Hartmann & Company." This was also opposed by Holzaphel & Company and was abandoned (R., pp. 402–5). The only legal trademark actually used in England at any time by any one who was engaged in the manufacture or sale of the paint, as the owner, was the one registered by Hart-

mann Brothers on April 25, 1883, and known as the "Red hand." They did not claim to have used this mark before the date of the application, and, therefore, did not fill in the blank left for the insertion of a statement on that subject (R., pp. 408–9). It was a new mark and omitted the word "Rahtjen" because they could not lawfully appropriate the exclusive use of that word. After Suter, Hartmann & Company had, in 1884, reigistered with a disclaimer, the parties wrongfully attempted to establish an exclusive right to the use of the word "Rahtjen" by incorporating it into the "Red hand" trade-mark, and this is the sole basis of the present company's claim to the exclusive right to the use of that word. This combination of the two English trade-marks is the one used by the respondent on goods imported into this country in 1898 at the time of the alleged infringement.

On April 23, 1878, Rahtjen having ceased to make shipments to Galien in 1877, Hartman, Le Doux & Maecker announced by publication in New York that they had been "appointed sole consignees in the United States of 'Rahtjen's Patent Composition'" (R., p. 190). They received their goods direct from the English factory with the English mark "Rahtjen's Patent Composition on them." The witness Hartman praduces and files certain invoices of paints sent to Hartman, Le Doux & Maecker in the years 1879, 1880, 1881, 1882 and 1883, in which the goods are described as "Rahtjen's Patent Composition" (R., p. 195). There is no evidence to show that they were sold here under any other mark. On June 23, 1885, Hartman, Le Doux & Maecker, the agents for the sale of the paint here, registered a mark in the United States consisting

of the word "Rahtjen's Composition," which had been adopted, as they say in their application, "for our use" (R., p. 210). They were not manufacturers of the goods nor were they owners, but only vendors, as agents for the manufacturers and owners. We insist that this was not a valid trade-mark; (1) because it was adopted by mere agents or salesmen for themselves as agents or salesmen; (2) because there is no evidence that it was ever actually used by them on goods sold in the market, which is necessary to establish a trade-mark here, though not so in England under the statute; and (3) because long before the date of the application the petitioners had been selling the paints here and using the word "Rahtjen" on their packages and in their advertisements, etc.

The respondent claims this alleged trade-mark by assignment, but there was really nothing to assign. Trade-marks may be assigned in connection with the business and good-will of the owner, but even if agents could acquire a right for themselves as such, they possessed no business or good-will except as agents for somebody else, and this they could not sell because the business and good-will of an agent terminate when the agency ceases.

On December 14, 1888, Suter, Hartmann & Rahtjen's Composition Company (Limited), an English corporation which had been recently organized, filed an application in the United States for the registration of the "Red hand" trade-mark which had been registered, as before stated, in England in 1883. It is minutely described in the application and it is therein stated that it had been continuously used by the applicant and his predecessors *since January, 1884* (R., 211).

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The parties then combined the two last-mentioned marks, just as they had previously done in England, and now claim the exclusive right to use the word "Rahtjen" in this country.

Between the 21st day of April, 1883, and the 23d day of October, 1886, the firm of Holzapfel & Company, the predecessors in business of the petitioner, registered no less than five trade-marks in England, all of which included the word "Rahtjen's," though they were required, as was Suter, Hartmann & Company, to disclaim the exclusive right to use that word. These registrations were parts of the public records and were known to the respondent's predecessors.

On the 23d day of March, 1889, the same firm registered a trade-mark in the United States which was similar to those registered in England, and consisted of three vertical parallelograms, on the central one of which was the fac-simile signature "Holzapfel & Co.," and above the parallelograms the initials and abbreviations "H. & Co.," and below are the words "Stir well before using," the whole surrounded by a circle composed of the words "Genuine Rahtjen's Patent Composition for Ships' Bottoms." And on the 4th of May, 1897, the firm registered in this country a further trade-mark, consisting of the representation of a propeller in connection with the words "Holzapfel's Compositions" in plain block capitals printed in black in a curve above the propeller. These are the marks used by the petitioner at the time of the alleged infringement.

Copies of all these registrations in England and here are on file with the Clerk of this Court, but are not printed in the record.

In 1883 or early in 1884 Holzapfel & Company commenced the manufacture of this composition in England for sale there and for exportation. Their first agent for the United States was appointed July 23, 1884, and before the date of the alleged infringement no less than thirty-nine persons and firms had been appointed and made sales in this country (R., 271-2). The testimony shows that the word "Rahtjen" invariably constituted a part of the marking of the goods manufactured and sold by them both in England and in the United States. M. Holzapfel testified as follows:

"Q. Now, when you formed the copartnership of M. Holzapfel & Company with your brothers and cousins and commenced the manufacture of said composition, how did you put it up and how did you mark it? A. The composition for home use we put up in wooden barrels; the composition for export we put up in iron drums. After 1883 we marked the composition according to the registered trade-mark, 'Rahtjen Composition' or 'Genuine Rahtjen's Composition for Ships' Bottoms.' The No. 3 with parallelograms in centre. The composition was advertised as 'Genuine Rahtjen's Patent Composition.' In 1886 or 1887 we added the propeller to this trade-mark.

"Q. Where did you manufacture and sell under the copartnership name of M. Holzapfel & Company the 'Genuine Rahtjen's Composition' or 'Genuine Rahtjen's Patent Composition?' A. It was manufactured at Gates' Head on Tyne, and was sold to most maritime countries in the world.

"Q. And during the continuance of the firm of M. Holapfel & Company this composition was put up in the manner and with the mark substantially as de-

scribed by you in your preceding testimony? A. Yes" (R., 263).

Again:

"Q. At the time that M. Holzapfel & Company began to manufacture this composition and mark it as the 'Genuine Rahtjen's Composition' or 'Rahtjen's Patent Composition' on the vessels containing it, how did Suter, Hartmann & Company mark the vessels containing the composition made by them? A. At the time we commenced to manufacture Rahtjen's composition and to mark it as previously described, Suter, Hartmann & Company still adhered to their old marks, as shown in the photograph.

"Q. You say in your previous testimony that this composition manufactured by M. Halzapfel & Company was sold in most maritime countries of the world. Was it ever sold in the United States to your knowledge, and if so, when and first, as near as you can tell? A. It was first sold in the United States in 1884 and has been sold there continously since.

"Q. Under what name or mark was it sold in the United States? A. It was marked 'Rahtjen's Anti-Fouling Composition for Ships' Bottoms' in a circle; three parallelograms in the centre; 'H. & Co.' over the parallelograms, and the words 'Stir Well Before Using' below the parallelograms, and it was invoiced as 'Genuine Rahtjen's Patent Composition.'

* * * * * *

"Q. Did the firm of M. Holzapfel & Company have another agent in the United States for the sale of said composition? A. Yes; we had several agents at several ports. To New York we first sent a man from Europe, called Perry, to represent us; later on, the agency was transferred to McCaldin Brothers, and after

that to Mr. John A. Donald. In San Francisco, we had A. C. Dietz & Company ; at New Orleans, Woodward, Wight & Company. We had agents at Boston, Philadelphia & Baltimore, but their names have escaped my memory.

" What was done with the business of M. Holzapfel & Company when the present defendant Company was formed ? A. The assets, good-will and trade-marks were sold to the present limited company " (R., 264–5).

The witness Scnitger, who was connected with the business from 1883, testified as follows :

" Q. Now, as to the marking of the vessels containing the said composition, which the firm of Holzapfel & Company made and sold, state whether or not the name ' Rahtjen's ' or ' Rahtjen's Composition ' or words substantially to that effect appeared anywhere thereon ? A. I drew up the first stencil plate on a sheet of paper in pencil and it certainly contained the word ' Rahtjen's,' but whether it contained the words ' Rahtjen's Patent ' I cannot say. The wording was ' Genuine Rahtjen's Composition ' or ' Genuine Rahtjen's Patent Anti-Fouling Composition for Ships' Bottoms.'

" Q. You are positive it contained the word ' Rahtjen's ' ? A. Certainly.

* * * * * *

" Q. Do you know whether the firm of L. Holzapfel & Company during your connection with it ever sold any of the so-called Rahtjen's Composition in the United States ? A. I know we consigned some to one firm. That is all I know about that.

" Q. Do you know the name of the firm ? A. I can't tell you exactly—Woodward, Wright or White, or something like that.

"Q. Do you remember when that was? A. I should say it was the end of 1883 or the middle of the year 1883.

* * * * * *

"Q. Do you remember whether or not this composition which was consigned to you or sold to parties in the United States by M. Holzapfel & Company during your connection with that firm was marked with the word 'Rahtjen's' or with any title of which the word 'Rahtjen's' formed a part? A. Certainly, it was marked with the word 'Rahtjen's.' It was marked 'Rahtjen's Genuine Composition' or 'Genuine Rahtjen's Anti-Fouling Composition for Ships' Bottoms.' That was the first marking" (R., 294–5).

A. C. Holzapfel testifies:

"Ever since my connection with the defendant company, we have advertied all our goods and amongst them prominently Rahtjen's composition, which has occupied about one-fifth or one-sixth of the space taken up by our advertisements. The total sum spent on advertisements is between 1,500 pounds and 1,800 pounds a year and has been so since 1887."

And in answer to further questions he says:

"Q. Now, prior to the formation of the present company, do you know whether their predecessors, Holzapfel & Company, advertized the said composition as made and sold by them, and, if so, how much they expended in advertisements? A. Rahtjen's and the International compositions were both adversed from 1883 onwards, each occupying about half of the space of the advertisement until further compositions were added to those manufactured by us in 1887. Therefore, Ratjen's composition from 1883 to 1887 occupied about one-half of our advertisements and the sums spent dur-

ing those years are from 1,000 pounds, progressing upwards to 1,500 pounds, as time advanced.

* * * * * *

"Q. How has the defendant company or their predecessors in business, Holzapfel & Company, marked said composition in the past and at present, so far as your knowledge extends; that is, have they or not always marked it with the name of which the word 'Rahtjen's' formed a part? A. The name 'Rahtjen's' was invariably marked on the vessels containing such composition.

"Q. And as manufactured by whom? A. Our name as manufacturers was always identified with the goods.

"Q. Was there any concealment of the fact that they were manufactured by Holzapfel & Company or by the defendant company, or any suggestion that they were the goods manufactured by Suter, Hartmann & Company or their successors in business? A. It was never suggested or attempted to be suggested that the Rahtjen's Compositions sold by us was manufactured by Suter, Hartmann & Company. Since 1887 or 1888, our trade-mark of a propeller was also added as a further distinguishing mark to these goods. Before that they were marked with one or the other of the registered trade-marks of Holzapfel & Company which are in evidence in this suit" (R., 330–1).

The fact that the petitioner and its predecessors sometimes used the word "Patent" in marking packages is wholly immaterial, as it is not claimed or necessary to claim that they had, or now have, the exclusive right to the use of the word "Rahtjen's." The respondent, in order to maintain its action, must show an exclusive right in itself to use that word, while the petitioner is simply defending a right which is common to all.

Third. That even if there ever was a valid trademark in Great Britain, Germany, or the United States, which included the exclusive right to use the word "Rahtjen" it has long ceased to exist, and the word became public property; that it certainly became *publici juris* in Great Britain on the termination of the patent in 1880, and the courts in Germany and Belgium have decided that it became public in those countries at the same time; that the exclusive trade in the article was in fact secured and protected by the patent throughout the maritime world by the patent itself and by the representations of the parties, not only before it was obtained and while it existed, but for several years after it expired; that the reputation and market value of the article were established by the patent and by the representations made to the public before and after the patent, and not by the use of the word "Rahtjen's;" that "Rahtjen's Composition" is simply the name of the article, and has long since ceased to indicate its origin or vendor, and that the words were used by the petitioner for that purpose only at and before the time of the alleged infringement, and, taken in connection with the other words and marks used on their packages, distinctly advised the public that the respondent was not the manufacturer or seller.

J. G. CARLISLE,
WM. MCADOO,
R. B. MCMASTERS,
For Petitioner.

tion in that country for several years, he introduced it into the markets of the United States. When he did so he elected not to apply for a United States patent, but to rely solely upon the protection of the name, "Rahtjen's Composition," under which he specifically required that it should be sold (Record, p. 298, Ex. Q.). Its reputation at once became established in this country, where it has ever since been sold by the Rahtjens and their successors down to and including this respondent. Four years after the establishment of this agency and trade-mark, and after the property right in the trade-mark had become fully established by the acts of the Rahtjens and their agent, a patent was secured in England for a formula used in the manufacture of one variety of the paint, which patent lapsed seven years later. Some years thereafter the petitioner, a manufacturer of and dealer in other paints, began the sale in the United States under the name of "Rahtjen's Composition" of a paint made by it in England. As soon as this became known to the respondent, it commenced this suit, wherein the Circuit Court of Appeals has sustained respondent's claim of exclusive right to the trademark, and has enjoined its further use by the petitioner.

It is now sought to have the proceedings of the Circuit Court of Appeals reviewed by this Court.

We respectfully submit that it is impossible to spell out of these facts any grounds sufficient to call for the interposition of this Court. Those suggested in the petition are clearly without foundation. We shall consider them briefly in the order in which they are recited.

PETITIONER'S POINTS.

I.

Paragraphs 1 to X of the petition recite the proceedings. In Paragraph XI it is said, "That the judgment and decree is erroneous" The petition shows that the exact form of the order of the Circuit Court of Appeals was prepared by, and entered on motion of, counsel for petitioner. (Petition, p. 19). It cannot complain of an action of the Court taken at its own request. Whatever has been done has been done at its solicitation. It now seeks to have that action reviewed under "a power which will be sparingly exercised" We submit that the petitioner has thus waived any right to further action, and that the respondent need go no farther.

Our understanding is that if this petition be granted the case will be treated by this Court exactly "as if it had been carried (here) by appeal" (26 St. at L., §6, p. 828).

The rule is plainly stated by Mr. Justice Gray, speaking for a unanimous Court, in Nashville, etc., R. R. Co., 113 U. S., 261, 266:

> "But the unsurmountable difficulty is, that the former decree appears upon its face to have been rendered by consent of the parties, and could not, therefore, be reversed, even on appeal. Courts of Chancery generally hold that from a decree by consent no appeal lies (2 Dan. Ch., Pract Ch. 32, §1; French v. Shotwell, 5 Johns, Chap. 555; Winchester v. Winchester, 121 Mass., 127). Although the rule has not prevailed in this Court under the terms of the acts of Congress regulating its appellate jurisdiction, *yet a decree which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause.*" [Italics ours.]

To the same effect are:

U. S. v. Babbitt, 104 U. S., 767.
Evans v. Phillips, 4 Wheat., 73.

U. S. v. Evans, 5 Cranch, 280.
Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S., 24, 39.
Pacific R. R. Co. v. Ketchum, 101 U. S., 289.

A fortiori, a decree entered upon the motion of a defeated party must be affirmed.

To grant the petition, therefore, can have no result beyond causing the parties the expense, and the Court the labor, of considering here a decree of a kind "always affirmed without considering the merits of the cause"—a result very barren, and, we submit, foreign to the purpose of the act under the provisions of which this petition is made.

Therefore, it avails nothing that the petition emphasizes the magnitude of the Court's power. It can, notwithstanding the state of the record, bring the cause before the Court for review; but the record shows conclusively that when the cause is brought before it, there will be nothing to consider.

II.

The second ground suggested for the interposition of this Court is found in paragraph XII.

> "The said case was decided in the said United States Circuit Court of Appeals for the Second Circuit, upon the supposed recognition of the said doctrine by this honorable Court in the case of the Singer Mfg. Co. v. June Mfg. Co., 163 U. S., 169, but the question presented by and involved in the said case of the petitioner was not presented by or involved in the case of the Singer Mfg. Co. v. June Mfg. Co., &c."

This, we say, with the greatest respect for the learned gentlemen on the other side, is baldly

fictitious and misleading. The Court of Appeals in this case says:

> "The Singer case, *supra*, had exclusive reference to the continuance of a monopoly in this country, upon which letters patent of this country had expired, and the Court held that the right to use the name passed to the public in this country, with the expiration of the exclusive right created by the patent, to make and sell the article. The decision followed the previous general course of decisions in the Courts of this country and elsewhere, *but it did not relate to the facts of this case*, as obviously appears in the opinion of Mr. Justice White who spoke for the Court" (Opinion of Court of Appeals, Petition, pp. 13, 14).

In other words, the petitioner says, and, in substance, reiterates in Paragraph XIII, that the Singer case had no relevancy to the present facts, the respondent so contended, and the Court so decided. All, then, are agreed that the Singer case has no application to the present. To bring it forward in order to induce this Court to exert "a power not ordinarily to be exercised" is a confession of weakness.

III.

In Paragraph XIII it is urged

> "That the question whether a common law trademark in the name of an article, is or is not affected in this country by the expiration or lapse of a foreign patent on said article, has never been judicially determined by any Court, prior to the said suit against your petitioner."

It would seem that something more than that the case be one of "first impression" is required before this Court will interpose in a case of a class wherein the judgment of the Court of Appeals is

made final by the act of Congress. There is here nothing more than the novelty of the question to call for this Court's interposition. Up to the present time it certainly has been of no "gravity and importance." To ask the Court to provide for the future when the past indicates that it is unnecessary, is to ask it to reverse the ordinary course of judicial determination and to change a jurisdiction which, we submit, was intended by Congress to be primarily corrective, into a jurisdiction essentially legislative.

If the Courts in different circuits had disagreed on this question of law, then there might be some basis on which to argue that the Supreme Court should consider and settle the question, but the mere fact that the question is new and has arisen but once is not a basis for a review by it. For if this Court should hold that it ought to review the question merely because it has not arisen before, the Circuit Courts of Appeals would have final jurisdiction only upon questions that had actually been settled by the Supreme Court, and they would so become merely ministerial in their functions.

Furthermore, if it be assumed that the question suggested is of importance, the determination of this case can do little to settle it. It has been said many times by many courts that each trade-mark case necessarily stands alone. This is strikingly true in the present instance. The paint was sold for four years in the United States before the English patent was applied for. The fact that the domestic trade-mark long antedated the foreign patent is a circumstance so important and so exceptional that this case is readily distinguishable from every case that has arisen or, in all human probability, will ever arise. Whatever may be the importance of the broader question suggested in the petition, the question involved in this case is important only to

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the parties. We submit therefore, that even if the question suggested requires the consideration of this Court, such consideration should be given in some other case where its answer is called for by the facts, and may be plain and unmistakable.

IV.

The petitioner also urges the interposition of this Court because it

> "Will be forever enjoined from using the word 'Rahtjen,' thereby ending an established business which it has built up through very many years."

The severity or breadth of the decree and the injunction founded thereon is not open to criticism or objection by the petitioner, for the reason that their precise form and scope were fixed by the order which petitioner's counsel prepared and submitted to, and which was approved by, the Court of Appeals.

V.

The petitioner wholly fails to make a case within the limitations which this Court has defined, and by which its discretionary action is determined. We understand that it is the policy of the Court to grant petitions of this character only in the cases which fall within the exceptions noted in Forsyth vs. Hammond, 166 U. S., 506, 514. Namely; where a question of great importance is involved; where there is a conflict between two or more Courts of Appeals or between a Court of Appeals and the courts of the State; or where there is some matter involved affecting the interests of the nation in its internal or external relations. Let us test the petitioner's case by this rule.

First. There is no question of great importance involved. The only parties in interest or in any way concerned in this controversy are the petitioner and respondent. The rest of the world is absolutely indifferent. It is not a case even where there is a great number of users of the name, all of whom will be affected by a decision as to one.

The record does not show that there is any other person who will be affected by the decision, and there is no allegation to such effect in the petition for certiorari.

Counsel for petitioner claim that if the present decree and injunction stand, its "established business built up through very many years," will be destroyed. This is not borne out by the facts in evidence. It appears that the defendant's business was established for, and for years confined to, the manufacture and sale of other paints than so-called "Rahtjen's Composition"; that the business which it has done in Rahtjen's Composition has always been of minor importance and subordinated to its business in its chief brand, "International Composition." The Court of Appeals on this point says:

> "It manufactures and sells other paints, the leading brand being called the 'International' which kind it makes special effort to sell. The business of the defendant in the United States from 1890 to 1895, including a few small invoices sent to different persons from 1883 to 1890, amounting to about 92 cwt., was a fraction over 2152 cwt." (Petition, pp. 11, 12).
>
> "It is true that the defendant has sold its manufacture of Rahtjen's Composition to a certain extent since 1890, but the sales have been comparatively small, and did not interfere with the complainant's business to any marked extent until the defendant obtained the contract with the Navy Department of the U. S. Government in answer to a call for offers of Rahtjen's Composition, when suit was promptly commenced. The defendant's

> chief brand of paint is the 'International Composition' and it has been their endeavor to sell that brand, if they could, and, failing that, Rahtjen's Composition. * * * The defendant's interference with the property rights of the plaintiff was, for many years, inconsiderable" (Petition, p. 15).

The defendant can be subjected to no loss whatever as to the past because there is no accounting in damages. The only detriment to which it can possibly be subjected is being prevented from making sales of Rahtjen's Composition to parties demanding it in preference to the petitioner's own brand, viz.: "International;" or, in other words, from selling to the customers of the respondent instead of its own. Its legitimate business can in no wise be affected by the present decree and injunction.

Second. The petition for certiorari alleges no such conflict of decision.

Third. It is evident that the issues involved have no import of a national or international character, and there is no allegation to that effect.

VI.

A close analysis of the case shows that the petitioner is aggrieved, not by reason of the application of the law, but the lack of facts to support its claims and requirements. Such a difficulty this Court in its discretion does not attempt to relieve by a review of the proceedings of the Circuit Court of Appeals. It may be said also that the difference between the judges who heard this case in the Circuit Court and in the Circuit Court of Appeals, is one merely of fact and not of law. Two contentions have been made

by the petitioner in its pleadings, in the taking of evidence, and in the trials below, both of which are upon questions of fact and constitute the points of difference between the judges who have heard this case.

The first is, that prior to the application for the English patent in question there had been no such use of the name "Rathjen's Composition" as to establish a common law property right in it. Counsel for petitioner in the Court of Appeals spoke of such use as merely "experimental," and tried to minimize the effect of the proofs.

The other point and contention are, that the name "Rathjen's Composition" has lost its original function of indicating the source or origin of the goods to which it has been applied, and has become generic and descriptive in character, irrespective of the legal effect of the lapse of the foreign patent.

On the first point it is to be noted, that the sales of Rahtjen's Composition in the years 1870–1873, inclusive, in the United States, amounted in value to nearly $10,000 (see testimony of John Rahtjen, p. 219, Appeal Record). The figures given by the agent (Gelien) during those years are somewhat less, but the difference is not material to the question under consideration. The evidence as to the sales in this country year by year also shows that the business was continuous and uninterrupted. These facts therefore fully sustain the majority of the Court of Appeals in finding that a common law trademark right had become established in the United States prior to November, 1873, the date of the English patent. On the other hand, they do not sustain the conclusion of Judge Wheeler in his decision in the Circuit Court, that

> "Rahtjen's Composition appears to have become a valuable article of commerce, well-known by that name throughout the maritime

> world through Rahtjen's expired English patent and his operations under it" (see page 3 of Petition).

Neither does it support the conclusion of Judge Wallace in his dissenting opinion, that

> "The name (Rahtjen's Composition) was the generic description of a patented article and passed to the public on the expiration of the patent,"

because the meaning of both statements is that the name commenced with, and owed its existence to, the patent.

The second point is, that the name "Rahtjen's Composition" had, in the language of the dissenting opinion of Judge Wallace,

> "long ceased to denote the source of the manufacture of the article."

This of necessity presupposes and presumes that there must have grown up numerous sources of supply for the article. If there were one source only no such impression could prevail. It is proven conclusively and without a particle of evidence to the contrary, that during all of the thirty years in which Rahtjen's Composition has been continuously sold in this country there has been but one authorized source from which it could be obtained. This source until 1879 was the factory of the firm of John Rahtjen, in Germany; for a year or two thereafter the factory of the same firm in England; from 1880 to 1891 the same factory, which had been transferred by the firm John Rahtjen to the firm of Hartmann Brothers and their successors, the English corporation of Suter, Hartmann & Rahtjen's Composition Company; and since 1891, the complainant corporation, the successor and offshoot of the English corporation. During all of this period also the agency in the United States has been a sole and

exclusive one; first, of Henry Gelien, representing the firm John Rahtjen until 1877; then Hartmann, Le Doux & Maecker, representing said firm and their successors in England until 1886; then Emil Maecker, a former member of said firm of agents, until 1889; then O. L. Petersen, until the organization of the complainant company. Further, there never has been but one *unauthorized* source for Rahtjen's Composition, and that the defendant, to a limited extent, immediately preceding the commencement of the suit.

We submit that these facts cannot sustain the contention of petitioner that the name "Rahtjen's Composition" had become dissociated from the origin of the goods so marked, and the majority of the Court of Appeals is fully justified in its conclusion viz:

> "We are not able to find from the record as a fact that in the United States the name 'Rahtjen's Composition' has become a generic name, and now means a composition made by any one after the original formula of Rahtjen" (Petition, p. 15).

The claim by petitioner that the trade-mark no longer suggests the origin of the goods because the petitioner itself, for the avowed purpose of securing respondent's customers, had provided a second source, is an offensive attempt to profit by its own wrong.

It may be noted also that during all of the thirty-five years of continuous sale of Rahtjen's Composition, first in Germany and later in the United States, the brothers Rahtjen have been directly interested in the business; first, as the manufacturers under the firm name of John Rathjen, afterwards as licensors under a royalty contract, and then as stockholders in both the English and American Companies, both of which companies employ as part of their corporate names, the surname "Rahtjen."

These facts, on both the points in question, justify the conclusions of the majority of the Court of Appeals, and it is fair to assume that had the facts been viewed in like manner by the dissenting member of the Court of Appeals, and by the judge in the Circuit Court, they would have reached a like conclusion upon the merits of the case.

VII.

It is significant that only one case is cited by the Court of Appeals, viz.: Le Page Company vs. Russia Cement Company (51 Fed. Rep., 941), and this solely in reference to the right of succession to the trademark, a question not herein involved.

The only other case referred to, that of Singer Mfg. Co. vs. June Mfg. Co., 163 U. S., 169, the Circuit Court of Appeals holds not applicable to the case at bar. In other words, upon the facts found, that Court merely states that a prior existing, domestic, common law trade-mark is not affected by a subsequent foreign patent on the thing sold under the trade mark. The decision goes no further than the particular facts of the case require, and no attempt is made to lay down any general rule of law applicable to any other than these anomalous facts.

Petitioner's "Claims."

Counsel for petitioner, after briefly stating its grievances and the reasons why relief should be afforded it, very adroitly present certain questions not involved herein, and their claim as to the rule of law applicable thereto.

We do not understand that it is the function of this tribunal to act as a moot court, or to command

that a cause be remitted to it merely for the opportunity thereby afforded to adjudicate questions purely hypothetical and speculative in character. We submit that to request such action is presuming upon the discretion of this Court. In the apt language of Chief Justice Church in the case of Guest v. Brooklyn, 69 N. Y., 513:

> "Courts have commonly occupation enough in determining controversies which have become practical without spending time in hearing discussions respecting such as are merely speculative or potential."

Any other rule would tend to make the granting of writs of certiorari depend in large measure on the fertility of counsel's imagination, and their skill in framing attractive abstract questions.

We briefly note the various "claims" of petitioner's counsel, and call the Court's attention to their lack of pertinency to the case at bar.

The FIRST is—

> "That when a name under which an article has become known in the country in which it was patented becomes public property there by reason of the expiration of the patent, it becomes public property the world over (except in such countries where there may be valid existing patents unaffected by the term of the foreign patent)."

This is a question which has nothing to do with this case because it assumes what is not true, that the name was first applied to the patented article, ignoring the proof of the long prior existence of the trade-mark.

The SECOND "claim" is predicated upon the first and is also a question not in any way involved in this case.

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The THIRD "claim" that—

> "If the respondent ever acquired a common law trade-mark in the United States, such trade-mark became public property when the English patent expired,"

is not a fair statement of the facts, since it also implies no earlier adoption of the trade-mark than the date of the patent.

The FOURTH—

> "That the respondent cannot have a common law trade-mark in the United States in a name which has become public property abroad,"

is still further at variance with the facts herein. The statement of the "claim" implies that the mark in question was public property abroad at the time it was first used in this country, which is not true.

The FIFTH "claim"—

> "That the name 'Rahtjen's Composition' has become the generic description of a patented article, and passed to the public on the expiration of the patent,"

is not pertinent for two reasons. It implies that the name "Rahtjen's Composition" is the generic description of an article previously covered by a domestic patent, whereas, there never was a domestic patent, and the name was in extensive use the world over for years before the foreign patent.

The SIXTH "claim"—

> "That the name 'Rahtjen's Composition' has long ceased to denote the source of manufacture,"

has already been discussed, and is simply a

question of fact which has been adversely decided by the Circuit Court of Appeals.

The SEVENTH "claim" is in effect that respondent has been guilty of such laches as to be barred from any relief. This also is a question of fact which has been passed upon by the Circuit Court of Appeals, and all the advantage which, under the established rule, is possible has been gained by the petitioner in the denial to the respondent of any accounting in damages. This is not a question proper for this Court to review, and we repeat that the statement of fact is not justified by the evidence in the case since the chief "established business" of the petitioner, according to its own witnesses, has never been in "Rahtjen's Composition" but others.

The EIGHTH "claim" is based upon a question of pure fact which the Circuit Court of Appeals has carefully considered and answered, and counsel for petitioner merely take issue with its finding.

The NINTH "claim" is based upon evidence of certain acts of the English corporation which owned the trademark rights in this country and transferred them to respondent, as to its rights in England. Nothing appears in the record giving to those acts extra-territorial force or effect to the prejudice of established property rights in this country.

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The Law.

But assuming that petitioner's counsel in their brief shall present arguments more forcible than the points of their petition, let us consider briefly the real question in the case and the analogies or guides which may be found in the decisions of this and other Courts.

This question is narrow, and in its consideration by the Court below, there has been no departure from, but a strict adherence to, the legal principles recognized by this Court and the Circuit Courts of Appeals. The Circuit Court of Appeals here holds that the Singer case is not applicable to, and does not govern, this case.

In the Singer case, the effect of the expiration of a domestic patent upon the trade monopoly in a name which had been applied to the patented article, was considered. This Court, in holding that the trade monopoly in the name ended with the patent monopoly, noted with approval exceptions to that rule in decisions of certain courts in foreign countries where patents had never issued on the article (see Petition, page 14). It is fair to assume and infer from the language of this Court in the Singer case, that if the conditions had been reversed, viz., had Singer secured foreign patents but no domestic patent on the article, the decision would have accorded with those of the foreign courts referred to. It is a fair deduction also that this Court would have held a case such as the present an exception to the established rule.

By the very respectable authority of the Court of Appeals of the First Circuit, in the case of Atwood vs. Castner, 88 Fed. Rep., 642, an exception is recognized to the general rule that a geographical name cannot be

appropriated as a trademark, where it appears that the name has become established and recognized as a trade name before its adoption in a geographical sense to designate the locality of such use, and hence such subsequent adoption could not affect the established property right in the name.

Still closer analogy is found in a case recently decided by the Circuit Court of Appeals of the Second Circuit (Batcheller vs. Thompson, 93 Fed. Rep., 660). In that case a domestic patent was used in connection with a trademark antedating the patent by two and a half years. The Court held that case an exception to the Singer rule solely because the trademark antedated the patent.

The exception noted by this Court in the Singer case, and the reasoning and findings of the Courts in the other cases above noted, are all in harmony with each other and with the decision of the Circuit Court of Appeals in this case. Not only is the decision of the Circuit Court of Appeals herein in harmony with the others noted, but this case is narrowed by the facts heretofore stated, that the trademark was established in this country with the avowed purpose at the time of seeking no patent in this country, sole reliance for protection being placed on the name under which the goods were required to be sold, and that the only patent involved was a foreign one applied for years afterwards. It is not necessary for us to call the attention of this Court to the analogy of the rule in patent cases universally recognized and followed by the courts in this country also.

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Conclusion.

On all the facts in the case, why should the Court grant the writ? If this petitioner on this showing can successfully appeal to the discretion of the Court, any defeated litigant in the Court of Appeals can with equal assurance present a like petition. We submit that no reason has been shown why this Court should depart from the wise rule by itself laid down in Forsyth vs. Hammond, noted above.

The petition should be denied.

New York City, May 10, 1900.

Respectfully submitted,

THOMAS B. KERR,
TIMOTHY D. MERWIN,
Counsel for Respondent.

No. 626. Oct. Term 54

Br. of Respt. Herein for Cross Pet.

FILED
MAY 28 1900
JAMES H. McKENNEY,
Clerk.

10947

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed May 28, 1900.

No. 626.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Petition for Certiorari on Behalf of Respondent.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the Rahtjen's American Composition Company, the respondent in the cause above entitled, respectfully shows to this Honorable Court:

I. That the above-named petitioner in this cause has heretofore filed its petition in this Court for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit, to review the decree and decision of that Court in this case, awarding to the respondent herein an injunction and costs against said

petitioner; and this Court has granted said petition and ordered that such writ issue. With its petition the said petitioner filed a complete record of the cause in the Court below, with the opinions of the said Court and of the United States Circuit Court therein, to all of which the respondent craves leave to refer upon the present petition.

II. As by reference to the record so filed appears, the United States Circuit Court of Appeals found that this respondent had and has a valid trade-mark for the article as placed upon the markets of this country, which had been infringed and used without authority by the petitioner herein; whereupon said Court made its decree for an injunction and costs as aforesaid, but did not order an accounting for damages or profits by reason of such use and infringement of respondent's trade-mark by said petitioner. Respondent by its bill of complaint prayed for such accounting, which it avers was erroneously refused by said United States Circuit Court of Appeals, and to preserve its rights in the premises now prays this Court that a writ of *certiorari* to said United States Circuit Court of Appeals in this cause may be granted to the respondent, requiring said Court to certify and transmit to this Court a full and complete transcript of the record and all proceedings of said Court in this cause, to the end that the same may be here reviewed and determined as provided by law and the accounting so prayed for be ordered and decreed.

And your petitioner, the above-named respondent, will ever pray, etc.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
By OTTO L. PETERSEN,
President.
THOMAS B. KERR,
TIMOTHY D. MERWIN,
Respondent's Counsel.

STATE OF NEW YORK, }
County of New York, } ss.:

OTTO L. PETERSEN, being duly sworn, says that he is an officer—to wit, the president—of Eahtjen's American Composition Company, the respondent above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true to the best of his information and belief.

OTTO L. PETERSEN.

Subscribed and sworn to before me this 26th day of May, 1900.

ATKINS B. CUNNINGHAM,
[NOTARIAL SEAL.] Notary Public,
N. Y. Co.

I certify that in my opinion the above petition is well grounded in matter of law and proper to be heard.

TIMOTHY D. MERWIN,
Of Counsel for Petitioner.

Memorandum in Support of Petition.

Since by the provisions of the statute under which the petition for the writ of *certiorari* heretofore granted herein to the Holzapfel's Compositions Company, Limited, as petitioner (viz., an Act to establish Circuit Courts of Appeal, etc., approved March 3, 1891, Sec. 6), this cause must be considered by this Court in the same manner as if it came up upon writ of error or on appeal, the foregoing petition is presented in order that all questions involved in said cause may be properly before this Court for its consideration. Inasmuch as the entire record has been certified up from the Circuit Court of Appeals, all matters of record in said Circuit Court of Appeals pertaining to the subject matter of this petition will be before this Court. Upon the argument of the cause as now ordered certified to this Court, the right of the respondent to the relief hereinabove prayed for will necessarily be determined, since it is based, and wholly dependent, upon the merits of the cause. It is apparent, therefore, that no additional burden will be placed upon this Court by the granting of the above petition, and the consideration of the question of the respondent's right to an accounting as prayed for.

Dated New York City, May 23, 1900.

Respectfully submitted,

THOMAS B. KERR,

TIMOTHY D. MERWIN,

Counsel for Respondent.

No. 267.
Brief of Merwin & Kerr for Respondent.

Office Supreme Court U.S.
FILED
APR 23 1901
JAMES H. MCKENNEY,
Clerk.

Filed April 23, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

TIMOTHY D. MERWIN,
THOMAS B. KERR,
Counsel for Respondent.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1900. No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Statement.

This is a suit for infringement of the common law trade-mark "Rahtjen's Composition," brought by the the respondent in the United States Circuit Court for the Southern District of New York. That Court dismissed the bill. Respondent then appealed to the United States Circuit Court of Appeals for the Second Circuit. That Court reversed the decision of the Circuit Court, and granted an injunction against the petitioner. The petitioner thereupon applied to this Court for a writ of *certiorari* for a review of the proceedings in the Circuit Court of Appeals, which was duly granted, and the case is now before the Ccurt under that writ.

The Trade-marked Article.

The article to which the trade-mark in question is applied, is prepared paint for the hulls of steel and

iron vessels, to protect them from corrosion and from adhering growths of animal and vegetable character.

There have always been three varieties of this paint, identified by the numerals I., II. and III. No. I. is known as the first or priming coat, otherwise called "anti-corrosive," designed to be applied to the bare metal to protect it from the corrosive action of subsequent coatings. Nos. II. and III. are finishing coatings, otherwise denoted "anti-fouling," which, by reason of their poisonous ingredients and gradual exfoliation in use, serve to repel the animal and vegetable growths. No. II. is designed for fresh or brackish waters, and No. III. for the salt waters of the deep seas. Nos. I and III. are those in most general use.

This paint was originally invented and compounded by John Rahtjen in Germany between the years 1860 and 1865, during which period he demonstrated its value by extensive experimental tests. About 1865, in connection with his sons, John and Heinrich, he began the manufacture of the paint for general use, and it speedily acquired a high reputation in the maritime world under the name of "Rahtjen's Composition," being generally adopted by the large German steamship lines. After his death, in 1873, his business was continued by his sons under the firm name of "John Rahtjen," and at about the same time they established a manufacturing plant in England. Since that date the German business has been carried on exclusively and uninterruptedly by the Rahtjen firm, and the English business exclusively by that firm and its agents and successors, Hartmann Bros. (Suter, Hartmann & Co. being selling agents), and the corporation Suter-Hartmann & Rahtjen's Composition Co., Ltd. This company was organized to combine the English sales agents with the English manufacturing agents, and the Rahtjens have always been among its stockholders and directors. Since 1880 Hartmann Bros. and their successor corporation, Suter-Hartmann & Rahtjen's

Composition Co., Ltd., have had the exclusive right to manufacture the paint in England and sell it in England and the United States, the Rahtjen firm retaining the exclusive business in Germany.

There has never been any other source for the paint, and the trade-mark has never ceased to designate it and represent its source or origin.

Respondent's Business.

In General.

The business of respondent and its predecessors in the United States has always been confined to the sale and use of "Rahtjen's Composition" furnished by said manufacturers, at first from Germany and later from England. The business originated as follows:

In November, 1869, Rahtjen, having been solicited by Henry Gelien, of Hoboken, New Jersey, for the agency for "Rahtjen's Composition" in America, gave it to him, under certain prescribed conditions. This appears by Rahtjen's letter to Gelien (Comp.'s Ex. Q., Rec. p. 189). In that letter Rahtjen stated that for certain reasons he did not intend to apply for a patent in the United States on his paint. He then proceeded to enumerate the conditions of the agency, the principal and vital one of which was that,

> "The paint shall be brought on the market under the name of 'Rahtjen's Composition.'"

In other words, in and by that letter, he acted on his election to rely for protection upon his trade-mark rather than to attempt to secure a patent for his invention. This election would seem to be determinative of this suit.

The first shipment of "Rahtjen's Composition" to Gelien was a small quantity in 1870 (J. Rahtjen, Rec., p. 139, Q. 373), the business becoming fully estab-

lished by the middle of 1871 (J. Rahtjen, Rec., p. 139, Q. 373, and Gelien, p. 166, Q. 6).

Gelien announced his agency to the trade by means of a show card headed "RAHTJEN'S COMPOSITION PAINTS" (Ex. R, following p. 208, Rec.), which he copyrighted August 5, 1871, under the title of "RAHTJEN'S COMPOSITION PAINTS" (Ex. UU, p. 206, Rec.).

He also adopted and continued to use during his agency, letter heads bearing the picture of a ship, in connection with the words—"RAHTJEN'S COMPOSITION PAINTS" (Ex. S, Rec., p. 190; Ex. U, Rec.,p. 191).

Gelien's agency continued until he was succeeded in 1878 by the firm of Hartmann, LeDoux & Maecker, appointed by the Rahtjen firm (J. R., Rec., p. 105, Q. 67-69; Ex. T, p. 190). Hartmann, LeDoux & Maecker were succeeded by Emil Maecker in July, 1886 (Ex. CC, Rec. p. 194), and Maecker was succeeded by Otto L. Petersen on January 1, 1889 (Rec., Ex. RR, p. 203). The latter's agency continued until 1891, when the respondent corporation was organized with him as president, acquiring the trade-mark and other exclusive rights in the United States, and succeeding to the business, which it has continued until the present time. Respondent purchases the paste or base of its "Rahtjen's Composition" from the English corporation Suter-Hartmann & Rahtjen's Composition Co., Lim., which succeeded to the manufacturing business of John Rahtjen in England (Petersen, Rec., pp. 48, 49, Re-d. Q. 304).

CONTINUOUS AND INCREASING SALES.

"Rahtjen's Composition" was supplied for the United States by John Rahtjen and the Rahtjen firm from Germany, from 1870 to 1879. John Rahtjen in his testimony, but without his account books, estimated the value of the total shipments to Gelien for that period at about $18,000 (Rec., p. 139, Q. 373).

Gelien himself, however, produced his original invoice book, and the part containing the record of this business was put in evidence (see Ex. QQ, printed as a supplement to the Record). This shows the net amounts from year to year for the entire period commencing with 1871, (not including the first shipment of the value of $82.50 in 1870), as follows, the dates being those of the shipments at Bremerhaven:

1871,	April	26	442 lbs.
	May	19	2,292 "
	June	27	2,812 "
	July	7	5,111 "
1872,	July	4	3,735 "
1873,	Jany.	3	4,083 "
	"	27	691 "
	April	8	4,775 "
	May	2	8,370 "
	Aug.	15	2,175 "
	Oct.	10	6,592 "
	"	"	700 "
	Dec.	16	1,952 "
1874,	Jany.	28	2,060 "
	Feby.	6	3,909 "
	"	"	2,670 "
	"	24	7,863 "
	June	23	1,982 "
	Oct.	30	4,217 "
1875,	April	24	2,384 "
	"	23	4,103 "
	Aug.	27	6,574 "
1876,	May	12	2,381 "
	July	28	2,609 "
1877,	Feby.	15	5,531 "
	July	31, 546 gals. Est. @ 10 lbs. per gal.	5,460 "
	Nov.	15, 280 gals. Est. @ 10 lbs. per gal.	2,800 "
		Total	98,272 "

Gelien estimates the total net value of these shipments as about $17,500 (Rec., p. 166, Q. 17).

The shipments by the Rahtjen firm to Gelien's successors Hartmann, LeDoux & Maecker, were:

1878	196 cwt.
1879 (first six months)	154 "

J. Rahtjen, Rec., p. 106, Q. 80)

Shipments after July 1st, 1879, were made by Rahtjen's English selling agents, Suter, Hartmann & Co., till 1888, afterward by their successors, Suter-Hartmann & Rahtjen's Composition Co. Lim., and were as follows:

1879 (Last six months)	70 cwt.
1880	120 "
1881	300 "
1882	320 "
1883	422 "
1884	620 "
1885	544 "
1886	550 "
1887	450 "
1888	360 "
1889	1,175 "
1890	1,007 "
1891 (nine months)	1,063 "

(Exhibits P and AA, Rec., pp. 185-9).

Thereafter (from Oct., 1891) the respondent company carried on the United States business.

The value of its business was at first about $70,000 a year, increasing to about three times that amount at the date of suit (Petersen, Rec., p. 17, Q. 20), or, as stated more in detail by the witness in answer to x-Q. 270 (Rec., p. 42), the gross business the first year was $71,400, of which the sales of "Rahtjen's Composition" were about 90 per cent. Gross sales 1897, $128,300, and 1898, $181,500, of which amounts

"Rahtjen's Composition" constituted about 80 per cent.

PAINT ALWAYS DESIGNATED "RAHTJEN'S COMPOSITION."

The paint, shipped from Germany to Gelien, and to Hartmann, LeDoux & Maecker, from 1870 to 1879, was marked "Rahtjen's Composition." (Rec., p. 104, Qs. 53–7; 106 Qs. 70–2; 155, Q. 7).

Similarly, the paint shipped from the English factory to the United States from 1879 to 1891 was marked "Rahtjen's Composition."

John Rahtjen testifies that when he transferred the manufacturing business in England to Hartmann Bros. in 1880, he turned over to them the stencils for marking the casks "Rahtjen's Composition" (Rec., p. 132, x-Qs. 315–9; pp. 133–4, x-Qs. 330–7). He says that he had special stencils made containing the words "Rahtjen's Composition," and that he always took care that "Rahtjen's Composition" should appear on every cask. Also that in subsequent years he examined the drums of paint put up by Hartmann Bros., and that they bore the name "Rahtjen's Composition" (Rec., pp. 137, 138, Qs. 362–6; pp. 140–1, Qs. 386–7. See, also, Exhibit KK; Rec., p. 198, which are photographs of the actual stencils so used). August Hartmann says that the paint shipped to the United States prior to 1883 bore the stencils 1 and 2 of Exhibit KK, that careful instructions were given to workmen that all such packages be so marked, and that all of the shipments to the United States from 1879 to 1891 were marked "Rahtjen's" (Rec., p. 156, Qs. 11–16; p. 158, Re-d. Qs. 30–1).

The witness Clark, whose father was local agent in New York City, says that the trade-mark "Rahtjen's Composition" was stenciled on the drums of paint furnished by Maecker (Rec., p. 162, Qs. 12–6). The witness also testifies that, after Petersen succeeded to the agency, the same trade-mark was used upon the drums of paint furnished by him (Rec., p. 164, Re-d. Q. 29).

Petersen testifies that while he was agent this trade-mark was used on the paint drums (Rec., p. 33, x-Q. 191).

TRADE-MARK IN THE BUSINESS LITERATURE.

Besides the use of the trade-mark in Rahtjen's letter to Gelien, and in Gelien's show card and letter heads above noted, the trade circular of Hartmann, LeDoux & Maecker, April 23, 1878, announced the agency business as for the sale of "Rahtjen's Patent Composition" (Ex. T, Rec., p. 190).

The trade-mark "Rahtjen's Composition" was registered by Hartmann, LeDoux & Maecker in the United States Patent Office June 23, 1885 (Rec., opp. p. 210), and by *mesne* conveyances became vested in respondent when it succeeded to the United States business.

Hartmann, LeDoux and Maecker's circular of July 1st, 1886, announcing their dissolution and the succession of Maecker to the agency, speaks of it as "for the sale of Rahtjen's Anti-fouling Composition" (Exhibit C C^2, Rec., p. 194).

Maecker's trade announcement of his agency is of the same purport (Ex. C C^1, Rec., p. 194).

The bills for paint from agent Maecker to the local agent Clark, in 1887 and 1888, are for "Rahtjen's Composition" (Exhibit LL, Rec., p. 201). The letter heads of Clark advertised him as sales agent for New York for "Rahtjen's Composition" (Exhibit MM, Rec., p. 201).

Peterson's announcement of this agency also states that it is for the sale of "Rahtjen's Composition" (Ex. R R, Rec., p. 203).

Sundry orders and bills in evidence show that after the formation of the American Company the paints were designated "Rahtjen's Composition," viz.:

Ex. Press Copy Bill May 2d, 1892, Rec., p. 50.
Ex. Telegraphic order April 22d, 1892, Rec., p. 51.
Exhibit Press Copy Bill April 27, 1892, Rec., p. 51.
Exhibit U. S. Gov. Requisition, June 20, 1893, Rec., p. 51.
Ex. Stencil Copies, marked "Complainant's Drums" Opp., p. 52, Rec.

It is evident from the foregoing, that respondent's business has been continuous and uninterrupted, and of increasing volume since 1870; that the trade-mark "Rahtjen's Composition" has always characterized this business and marked the paint; that the sole source of the paint has been the Rahtjen factory, first in Germany and later in England; that both of these factories have always been owned and operated by the Rahtjens, or their successors with whom the Rahtjens have always been connected either as principals or stockholders; and hence that the name, "Rahtjen's Composition," has always indicated, not only the ownership, but the source and origin of the articles to which it has been applied.

Petitioner's Business.

Petitioner is, and always has been, engaged in the manufacture, use and sale of paints for the same purpose as respondent's "Rahtjen Composition." It has always had a variety of brands of these paints, the leading one being "International," which it has always recommended and endeavored to sell in preference to all others (M. Holzapfel, Rec., pp. 275–276, x-Qs. 116–118). The Circuit Court of Appeals found that it began to send its Rahtjen's composition to this country in 1890, and not 1883, as claimed by petitioner. Only six small sample lots had been sent over during the preceding seven years. From 1890 to 1895, inclusive, petitioner shipped to its agents in this country only about 2,000 cwt. of Rahtjen's composition. Since 1895 it has carried on its business here without agents (Rec., p. 282).

In June, 1898, the petitioner made a successful bid, and was awarded a contract for furnishing the Navy Department with Rahtjen's composition for the New York Navy Yard (Petersen p. 18 Q. 32–38). The Navy Department had never bought any

paint under that name from the petitioner (Andresen, Rec., p. 231, x-Qs. 113, 114), and because of this interference with respondent's business, and infringement of its trade-mark rights, this suit was promptly instituted. Since the commencement of the suit, the petitioner has made numerous other sales of its Rahtjen's composition to the United States Government, and has extensively advertised the same. (Petersen, Rec., p. 19, Qs. 43–5; pp. 170–1, Q. 21; Ex. TT, p. 205).

Petitioner's business in paint under the name of "Rahtjen's Composition" may be summarized as follows:

It began about 1890–1892; nothing but sample lots being shipped before.

Only a small amount was brought to or sold in this country prior to 1898.

Petitioner's chief trade is in "International" paint, and that name and not "Rahtjen" is the one usually identified with the paints sold by it.

Petitioner's Contentions.

The petitioner assails the position and rights of the respondent upon three grounds:

I. That an English patent was granted to Heinrich Rahtjen upon the formula for manufacturing Rahtjen's composition, which patent was applied for, and bears date, November 29, 1873; that this patent lapsed for non-payment of taxes seven years later; and that the name "Rahtjen's Composition" was adopted to designate the article patented, and became public property everywhere with the lapse of the patent:

II. That the respondent has been guilty of such laches as to defeat its claims to the exclusive right to the trade-mark:

III. That the petitioner has never attempted to counterfeit the goods of the respondent, nor to deceive the public into buying its paints as and for respondent's; and that it has always applied to its paints other subsidiary marks, identifying them as of its production and distinguishing them from respondent's:

IV. That the name "Rahtjen's Composition" has become generic, and, hence, that respondent cannot enjoy its exclusive use: and,

V. That respondent's real trade-mark is not "Rahtjen's Composition," but the words "Hartmann's Manufacture," in connection with the symbol of a red hand, and that, as petitioner has never used either those words or that symbol, it has not infringed any rights of respondent.

I. The English Patent.

The Facts.

The first contention is untrue in fact. It is conclusively proven that this trade-mark was adopted by Rahtjen, in connection with his business in the United States, in his letter of November, 1869, granting the agency to Gelien. His paint was shipped to Gelien under his trade-mark, and an established business therein carried on for three years before the date of the application for the English patent. It also appears (particularly by Exhibit QQ, printed as an appendix to the record) that there were three different varieties of Rahtjen's composition—namely, I., II. and III. (see, also, A. C. Holzappel, Rec., pp. 332, 333, X-Qs. 72-79).

Besides, Rahtjen had established a regular business in England in the sale of his paint, under the trade-mark "Rahtjen's Composition" and had carried it on for two and one-half or three years before the appli-

cation for patent. The extensive use of Rahtjen's composition prior to the patent, is admitted by petitioner's chief witness, A. C. Holzapfel, the only one having any personal knowledge whatever of the business prior to the date of the patent, and who was at one time in the employ of Rahtjen's English agents. He admits that he knew that Rahtjen's composition had been sold in England by these agents for some two years prior to the patent, and had been applied to about 120 vessels during that period (A. C. H., Rec., p. 318, Qs. 8 & 9).

John Rahtjen testifies that prior to November, 1873, the date of the English patent, the trade name "Rahtjen's Composition" had great value, and that his composition was looked for, and there were many buyers and many people applied for agencies, and that the reputation of the composition in the trade "was a very good one" (J. R., Rec.,p. 110, Qs. 116-118). The name "Rahtjen's Composition" had become officially recognized, as shown by the language of the Admiralty letter of November 18, 1873 (Ex. M, Rec., p. 185). Rahtjen refers to the subject matter of the Admiralty letter, and gives it as the reason for establishing his factory in England (J. R., Rec., p. 115, X-Q. 180).

William Hartmann testifies that the paint was generally known to the trade as "Rahtjen's Composition" prior to the date of the patent (W. H., Rec., p. 56, Qs. 21-26; see, also, Ex. J, 1-4, pp. 181 and 182, and Ex. K, 1 and 2, p. 182). These exhibits are letters concerning, and orders for, paint under the name of "Rahtjen's Composition," showing the common use of the term during the years prior to the patent. He also produced and introduced in evidence a show card and identified its publication as several months prior to the date of the patent in question (W. H., Rec., p. 58, Qs. 37-46. The show card testified to by the witness is a duplicate of Exhibit Y, Rec., p. 62, after A77). It also appears by the evidence that the English patent in question (pp.

387–389) gives but one of the three or more formulæ for the manufacture of the different varieties of Rahtjen's composition, viz., No. III., all of which varieties, as well before as during and after the patent, were manufactured and sold under the name or mark of "Rahtjen's Composition." Consequently, the trade-mark in England was originally used to designate this paint for several years prior to the patent, and during the life of the patent was employed to identify the unpatented as well as the patented varieties.

Such being the history of the trade-mark in England, the contention of counsel for the petitioner that with the lapse of the patent the name became public property, even in England, is without force; and if not in England, much less could it become *publici juris* in the United States.

Not only was no patent obtained in the United States upon this paint, but Rahtjen definitely decided and declared his intention not to attempt to get a patent, but to rely upon his trade-mark, as early as 1869, when he wrote to Gelien the letter previously referred to. He abided by this decision and never applied for a United States patent.

It is striking and significant also that, while the term "patent" was generally applied to the paint in England, that term was never used, as far as the evidence in connection with the business in the United States is concerned, except in two instances:

1st. In Gelien's letter of February 27, 1875 (Ex. U², Rec., p. 191), written to Suter, Hartmann & Company in England, in which he uses the expression "Rahtjen's Patent Composition" three times, and the expression "Rahtjen's Composition paint" once. This letter was written with one of the English circulars issued during the life of the English patent, which had just been received, lying before him, in which the English firm used the word "patent" in the name, as was their custom. It was natural that Gelien, in writing to them

under such circumstances, should have used a like term. But his use of the name without the word "patent" in the same letter, shows that it was unconscious and unintentional. At all events, the word "patent" did not appear at all in his dealings with his trade.

2d. In Hartmann, Le Doux & Maecker's announcement of the establishment of their firm (Ex. T, Rec., p. 190), dated April 23, 1878. The first-named two of these gentlemen were Englishmen, and connected with the English sales agency firm. They evidently followed their practice in England during the life of the patent, in this notice. There is no evidence, however, that either they or their partner, Mr. Maecker, ever marked or billed the paint in this way, or ever again used the word "patent" in connection with the American business.

The Law.

The law does not support this contention of petitioner.

We submit the following as a general proposition applicable to this point:

That a trade-mark, or a name originally adopted and used as a trade-mark, does not become public property, merely because subsequently;

(a) The name is adopted and applied geographically; or,

(b) Becomes the chief or sole name by which the article is known to the public; or,

(c) A patent is secured upon the article.

(a) Geographical name.

The proposition laid down above is recognized in respect to a name applied to the place of origin of the

article in the case of Atwood vs. Castner, 88 Fed. Rep., 642. It is true that the conclusion of that court as to the validity of the trade-mark is overruled by the recent decision of this Court in Castner vs. Coffman, 178 U. S., 168.

But the point referred to in the Court of Appeals case was not involved in the case in this Court. This Court found as a fact that the coal sold under the name in question was so named *after* that name had been applied to the town or locality.

(b) The trade-mark is unaffected by the fact that it subsequently becomes the common name of the article.

In the case of Selchow vs. Baker, 93 N. Y., 59, the question being

> " whether the words 'sliced birds,' or 'sliced objects,' or 'sliced animals,' which the plaintiffs claim to have appropriated as a trade-mark, are capable of being so appropriated,"

the Court, by RAPALLO, Judge, at page 66 of the opinion, said :

> " We think the word adopted by the plaintiffs constitutes a valid trade-mark. It cannot be true as a general proposition, as contended on the part of the defendants, that when a manufacturer has given to his products a new name invented by himself for the purpose of distinguishing them as his, and the articles become generally known to the trade and to the public by that name, the name becomes public property and every one has a right to use it. That proposition can be sustained only in respect to names which are descriptive of the article and incapable of being appropriated as trade-marks. The value of a trade-mark consists in its becoming known to the trade as the mark of the manufacturer who has invented or adopted it,

and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value, operate at the same time to destroy it. * * * * * * * * * * *

Our conclusion is, that where a manufacturer has invented a new name, consisting either of a new word, or a word or words in common use, which he has applied for the first time to his own manufacture or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article" (p. 69).

In the case of Burton vs. Stratton, 12 Fed. Rep., 696, Mr. Justice BROWN says at page 702 :

"But if the primary object of the trade-mark be to indicate the origin or ownership, the mere fact that the article has obtained such a wide sale that the mark has also become indicative of quality is not of itself sufficient to debar the owner of protection or make it the common property of the trade. To hold otherwise would be to deprive the owner of the exclusive use of his trade-mark just at the time when it had become most valuable to him and stood most in need of protection."

In Celluloid Mfg. Co. vs. Cellonite Mfg. Co., 32 Fed. Rep., 94, Mr. Justice BRADLEY quotes with approval from the case of Selchow vs. Baker, cited, and says at page 98 of the opinion :

"It is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour. I am satisfied from the evidence adduced before me that the word 'celluloid' has become the most commonly used name of the substance which both parties manufacture, and, if the rule referred to were of universal application, the position of the defendant would be unassailable. But the special case before me is this: The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown, and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellative of the substance manufactured, can take away the complainant's right. It seems to me that it cannot."

In the case of Celluloid Mfg. Co. vs. Read, 47 Fed. Rep., 712, Judge SHIPMAN cites both Celluloid Mfg. Co. vs. Cellonite Mfg. Co. and Selchow vs. Baker, and holds that the law on that point is settled.

(c) A subsequently granted patent on the article cannot affect the established trade-mark.

In the case of Batcheller vs. Thomson, 35 C. C. A., 532, the Circuit Court of Appeals of the Second Circuit, say:

"In this case the name antedated this patent by more than 2½ years, and *the name and not the pat-*

ent, so far as can be seen, gave value to the article" (italics ours).

The present case does not fall directly within any of these classes, although in our opinion it must be determined in favor of the respondent under the principles thus definitely settled therein. In so far as the particular facts are concerned, the case is a novel one, and in this sense it may be said to raise a new question, which is:

DOES THE EXPIRATION OF A PATENT IN A FOREIGN COUNTRY DESTROY A PREVIOUSLY ESTABLISHED DOMESTIC TRADE-MARK?

The leading decision of this Court relating to trade-marks upon patented articles is Singer vs. June, 163 U. S., 169. This decision enunciates the rule that a trade-mark which an inventor has adopted for, and applied to, his patented invention, becomes public property with the expiration of the patent. In the Singer case, however, the trade-mark and patent were both domestic. In this case the trade-mark is domestic and the patent was foreign. The Singer decision, therefore, is not applicable here. It does not appear that the Court contemplated its application to such a case.

In distinguishing that case from the cases in England, Scotland and France, in which the trade-mark rights were upheld, this Court says at pages 195-6 of the opinion:

> "Nor is there anything in the Scotch case of the Singer Mfg. Co. v. Kimball & Morton, 11 Ct. Sess. 3d s. 267, or the English cases of Singer Machine Manufacturers v. Wilson, 3 App. Cas. 376; 2 Ch. Div. 434; and Singer Mfg. Co. v. Loog, 8 App. Cas. 15, and 18 Ch. Div. 395; which in any way contravenes the doctrines heretofore stated. In the Kimball case, the fact that there had

been no patents in England was expressly referred to, the court finding that for many years prior to 1870 machines like Singer machines had been manufactured under various names in England and Scotland by other parties than the Singer Company. It was upon these facts that the Court based the right of the Singer Company to an exclusive trade-mark in the name. Indeed, Lord ARDMILLON (p. 276) expressly declared that he regarded the facts, above stated, as distinguishing the case from the *Shakespear case, supra.*

This distinction is also true of Singer Mfg. Co. vs. Wilson, and Singer Mfg. Co. vs. Loog. In neither was there a claim of a generic description as a consequence of a monopoly, and it becomes, therefore, needless to review these cases at length."

The syllabus in the Scotch case of Singer vs. Kimball, cited in Singer vs. June, is as follows :

"The manufacturer of a sewing machine of a certain construction which was not patented, had been in use to sell it under his own name for a series of years, and the name had thus obtained an exclusive meaning in the trade, as signifying a machine of his manufacture. *Held*, that the name had become the property of the manufacturer, and that no one else was entitled to use it."

And at page 275 of that opinion, Lord ARDMILLON says :

"I am of the opinion that this is a clear case. It is not a question of patent. The petitioners for interdict, who are the respondents in this appeal, have no patent, and claim no patent for this machine.

The only authority apparently adverse, is the

case of Wheeler and Wilson, in November, 1869 (Law Jour. Ch. Rep., Vol. XXXIX, p. 36).

But the Wheeler and Wilson case was the case of an expired patent, where the machine was distinguishable rather by the novel invention to which the patent applied than to the name of the maker as a guarantee of construction and durability."

The syllabus of Singer vs. Wilson, cited in Singer vs. June, is as follows:

"Plaintiff made a sewing machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the machine known as the 'S' sewing machine, and which were made in great variety and with many modifications, but though not protected by patents, were established in favor under that name. W. sold sewing machines, and advertised, among others, 'S' sewing machines, but used his own trade name upon the machines, and expressly stated in his advertisement that the machines sold by him were manufactured by him; *Held*, that this, nevertheless, constituted a wrongful invasion of the property of plaintiff, and that W. might be restrained by injunction."

The contention of the claimants is stated on page 377 of that opinion as follows:

"The machines sold by appellants were not patented in this country, and the appellants professed that they from time to time introduced modifications in the making of these machines, but they claimed to have an exclusive right to apply, on all occasions, the name Singer to them, which name, they insisted, had become their trade-mark or trade-name and designation."

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This Court, in Singer vs. June, on page 198, says further :

" The French decision mainly relied on, by the plaintiff in error, is that relating to the use of the surname Bully in a toilet preparation known as the ' Vinegar of Bully,' but the facts upon which the case was decided are misapprehended. In that case the sole question was whether the surname ' Bully ' had been either expressly or tacitly dedicated, by him, to the public by connecting it with his preparation. The Court of Cassation rested its decree upon the finding of fact by the Court below, which was conclusive on it, that no such association of the name, by either the express or tacit consent of Bully, had ever taken place. We excerpt, briefly, the language of the Court of Cassation as reported in the Dictionary of De Marafy, Volume 1, page 11 :

Whereas, without doubt, the methods of manufacture of a patented product fall into the public domain after the expiration of the patent, but it is otherwise as to the name of the inventor, and that this rule suffers no exception, except in the case where, either by long usage or in consequence of a consent either expressly or tacitly given, by the inventor, his surname having become the sole usual designation of his invention, it is employed to indicate the mode or the system of manufacture and not the origin of the particular manufacture.

Whereas, it is declared by the judgment appealed from, that Claude Bully has never manifested an intention to indissolubly bind up or unite his name for the benefit of his invention,' etc., etc.

And the same distinction controlled the case of Howe, where the French courts enjoined the use of that name on a sewing machine. There the Court, as a basis of its decree, used the following

language: 'And whereas, they (Howe and his heirs) did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain,' and have 'never, either expressly or tacitly, abandoned the right to affix his name' (that of Howe) 'to the products of the invention.'"

This Court then summarizes or enunciates the rule as follows:

> "The result, then, of the American, the English and the French doctrine universally upheld is this, that where, *during the life of a monopoly created by a patent*, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying or generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created" (italics ours).

This general statement of the rule, in view of the comments upon the cases in foreign courts, cannot be understood to mean that the expiration of a patent in one country makes the name public property in another country, as counsel for petitioners contend.

Nor can the rule apply to a case like the one at bar, where, confessedly, the trade-mark was established in use, and had acquired a large value prior to its application to a patented article, particularly when such application to the patented article *was not exclusive*. In such a case, the value is derived from the trade-mark, and not from the patent. That is to say, it cannot apply where the right to the trade-mark has vested before the occurrence of the fact by means of which it is sought to destroy the trade-mark.

Obviously, the doctrine of the Batcheller case cited is in entire harmony with the Singer case. In the latter

this Court held that the patentee could not prolong the monopoly in a patented article by appropriating the name by which it had become descriptively known during the life of the patent. In the Batcheller case the trade-mark had vested in the owner prior to the patent. The contract subsequently made between the public and the patentee was for *the invention*. The public gave up the right to *make and use* it for a limited term. It received the knowledge *how* to make and use *the invention*. It received the full consideration and had no right to demand the trade-mark in addition.

On the other hand, *the value of the trade-mark* was not enhanced by giving the owner the right to prevent others from making and selling the article *under any other name*. Such right was wholly due to the patent and ceased at its expiration.

This left the parties in the original position as to the trade-mark, but with a fulfilled contract as to the invention. It was a case where the trade-mark did not *arise out of the invention*, and was not descriptive of the same, or a mere synonym therefor.

If the petitioner's contention is based upon the presumption of abandonment of the trade-mark by respondent's predecessors by reason of their application for the British patent, we reply that this Court, in the Hunyadi case, decided the present term (Saxlehner vs. Eisner 179 U. S., p. 19), fully disposes of such a contention as follows (p. 31):

> "To establish the defense of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed."

Not only is there no affirmative proof of abandonment in the case at bar, but, on the contrary, there is the strongest proof of intention not to abandon the trade-mark in this country: 1st, in its original, deliberate selection; 2d, in its continuous, exclusive and uninterrupted use; and, 3d, in its registration in the United States Patent Office.

We submit, therefore, that the business was established under this trade-mark in the United States (and Germany and England as well) years before the grant of the English patent; that the trade-mark has never been abandoned; that it was never appropriated exclusively to the formula of the patent, even in England, but was applied generally to all paint for ships' bottoms, manufactured or originated by Rahtjen, and hence the business owed its value solely to the name; that as there never was a patent in the United States, the business here had no connection with any patent; that, hence, under the decisions in the several Singer cases cited, the English patent has no bearing on this case; and that, under the Batcheller decision, it would have none, even if it had been a domestic patent.

II. Laches.

Petitioner's second contention is that the respondent has been guilty of such gross laches that, even supposing its right had not otherwise been impaired, it can not recover against the petitioner, nor enjoin its use of the trade-mark.

In support of this contention it relies upon certain meager evidence of its importation and sales of paint under that name. The facts proved, however are wholly insufficient for this purpose. Its witnesses testify merely that such a brand of paint was shipped to the United States (M. H., Rec., pp. 268, 280); that certain specified vessels were painted with it (Andresen, Rec., pp. 219, 220); that certain persons not con-

nected with the respondent knew of sales by it of paint under that name (Coverly, Rec., p. 244, Q. 8; Haffner, Rec., p. 247, Q. 10; Adair, Rec., p. 251, Q. 7; Miller, Rec., 255, Q. 13); that it made no concealment of the fact that it dealt in Rahtjen's composition; and that several years before suit was brought, it advertised "Rahtjen's Composition" for a short period, (Andresen, Rec., p. 215 Q. 21).

In a single instance only does the evidence of petitioner indicate the possibility of knowledge by the respondent company of a sale of petitioner's imitation Rahtjen's composition (Andresen, Rec., p. 217 Q. 26). This is merely to the effect that the witness saw Mr. Petersen, the president of the respondent company, on a dock looking at certain drums containing petitioner's so-called "Rahtjen's Composition." This testimony is incompetent to prove knowledge by respondent, because the witness does not say that the petitioner's drums were marked "Rahtjen's Composition." It is the only instance, in all of the petitioner's evidence, in which attempt is made to show knowledge on the part of respondent of petitioner's alleged sales of paint under respondent's trademark. The witness testifies that two other persons were present on this occasion, one of them being petitioner's manager Donald, and yet neither of them is called to corroborate the witness on this point. The entire deposition of Andresen is wholly unreliable and wanting in probative force. He stubbornly and persistently refused to produce books of account and other papers which would corroborate or disprove his statements, or to give on cross-examination any evidence whatever by which the respondent could test their accuracy.

The utmost that petitioner's evidence could do was to create a presumption of knowledge on Petersen's part, but this is destroyed by his denial. He testifies that he never knew of a single sale of Rahtjen's composition by the petitioner prior to that complained of in this suit (Petersen, Rec., p. 17, Q. 23; p. 168,

Qs. 2, 3), and that he supposed any competing business of the petitioner was done with its "International" brand and not "Rahtjen's" (Petersen, Rec., p. 26, x-Qs. 122-3; p. 30, x-Qs. 154-162). He admits that several years prior he may have seen advertisements of the petitioner or its agents of "Rahtjen's Composition," but states that in one instance, when he heard of such an article being offered for sale, he called at the office of the person who made the offer, and gave notice that he would be proceeded against if he made any sale, and that shortly afterward he issued a general warning to the public against any spurious or imitation Rahtjen's composition (Petersen, Rec., pp. 37-39, x- Qs. 225-247); that the first instance of any attempted competition by the petitioner with the respondent in the sale of Rahtjen's composition which came to his knowledge, was in December, 1896, when the petitioner made a bid for furnishing the Government with Rahtjen's composition for the Mare Island Navy Yard (Petersen, Rec., p. 17, Qs. 23-4); that this bid of petitioner's was rejected, and hence he paid no attention to it (Petersen, Rec., p. 33, x-Q. 186); and that thereafter, prior to 1898, he knew of no competition or attempted competition by the petitioner with the respondent in the sale of paint under the name "Rahtjen's Composition" (Petersen, Rec., pp. 26-7, x-Qs. 119-27).

So far from the evidence showing any neglect of its interests by respondent, or delay in asserting its exclusive rights, its whole trend discloses due and commendable diligence. In order to impute laches, it must be shown that the party to whom it is imputed had actual knowledge of the fraudulent or infringing acts of the party complained of; and, as this Court has repeatedly stated, laches, as a defense in the case of an active and continuing fraud, must amount to assent or acquiescence. There certainly has been no assent to, nor acquiesence in, the acts of the petitioner. On the first occasion of information coming to the re-

spondent that any one was actually offering an imitation Rahtjen's composition for sale, personal notice not to do it was given to the party, and a warning was issued to the trade. The first attempt at competition in the sale of Rahtjen's composition by petitioner known to respondent—December, 1896—was ignored, simply and properly because it failed; but the first attempt which was successful was met by the prompt assertion of respondent's rights in the commencing of this suit.

It is to be noted also, that even if the respondent had had knowledge of the specific instances cited by the petitioner, of its use of Rahtjen's composition in the painting of vessels, the insignificant character of the competition would have excused, if not fully justified, the respondent in ignoring it. The president of the respondent company, when asked what the profit to his company would have been if he had secured all contracts specified by the witnesses for the petitioner, answered that $200 would about cover the whole profit (Rec., p. 168, Q. 6).

Neither would a mere advertisement of "Rahtjen's Composition" justify a suit. The reason is aptly stated by the witness Petersen (Rec., p. 36, x-Q. 213):

> "As long as we found it was doing us no injury, and as we were not cognizant of the fact that they had offered it for sale, we let the matter rest at the time."

Note, also, that it appears that the respondent believed that all business competition of the petitioner, except in the 1896 and 1898 instances, was by sales of its "International Composition," as against respondent's "Rahtjen's Composition." This was natural, from the fact that "International Composition" was, as petitioner's witnesses state, their chief, leading and preferred brand of paint, which they

always sold in preference to any other, if possible. (See, for example, the testimony of M. Holzapfel, Rec., pp. 275–6, x-Qs. 116–118).

It is evident that the small amount of paint which the petitioner imported into the United States under the name of "Rahtjen's Composition" could have been readily disposed of throughout the country, without the knowledge of others in the trade, by using it upon small vessels, tramp steamers and those of minor steamship lines, which are usually coated abroad and for which competing bids would not be asked in this country. This fact, especially in connection with the other fact above noted, that the petitioner's business was substantially and principally the sale and use of "International" paint, shows that it is entirely reasonable to suppose that respondent did not know of any sales of paint in infringement of its trade-mark.

The Law.

This Court lays down the rule as to laches in McLean vs. Fleming, 96 U. S., 245, at pages 253–4, as follows:

> "Equity courts will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

So also in Menendez vs. Holt, 128 U. S., 514 (523), this Court says:

> "The intentional use of another's trade-mark is a fraud, and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is

a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. * * * *

Acquiescence to avail must be such as to create a new right in the defendant (citing cases). Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' * * *

But there is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of the complainant's rights. There is no pretense of abandonment. That would require proof of non-user by the owner or general surrender of the use to the public (524).

This Court also says in the Hunyadi case (p. 39):

"But in cases of actual fraud, as we have repeatedly held, notably in the recent case of McIntire vs. Pryor, 173 U. S., 38, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishing principle that, where actual fraud is proven, the Court will look with much indulgence upon the circumstances tending to excuse the plaintiff from prompt assertion of his rights. Indeed, in the case of an active and continuing fraud like this we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

Clearly laches cannot be imputed to respondent, for petitioner's infringing business prior to suit was trifling and did not interfere with respondent's, and there is no proof that respondent had knowledge of it. Any presumption of such knowledge arising from the unsupported and negative testimony of Andresen, and the statements of other witnesses as to importations and sales by defendant, is completely overcome by the denial of knowledge by Petersen and the fact that petitioner's chief trade was in "International" paint, and that that name and not "Rahtjen" identified its business.

When the infringement came to its knowledge, respondent acted promptly and with due diligence brought suit.

III. Subsidiary Marks.

The third contention of petititioner is, that it has always distinguished its paint from respondent's by its own subsidiary marks. These were "Holzapfel's Manufacture," the symbol of a red propeller, and other minor marks. But with the subsidiary marks always appeared respondent's trade-mark "Rahtjen's Composition."

On this point, too, this Court has spoken in terms of no doubtful meaning. In Menendez vs. Holt, 128 U. S., 514, at page 518, it says, as follows:

> "The defendants' answer states that the 'La Favorita' flour they sold was always accompanied by the name of S. O. Ryder, plainly and prominently added to the brand.
>
> Thus one concern sold flour branded 'La Favorita, Holt & Company,' and the other concern sold flour branded 'La Favorita, S. O. Ryder.' The name of the party selecting the flour, sold under these brands, was plainly stated by either party. If, therefore, the allegation of the

answer respecting the use by the defendants of said brand be taken as a qualified admission in the case, this allegation shows that there was no infringement of the *real* brand used by the complainants. Beyond that there is no proof in the case at all of any infringement, because the testimony does not disclose where or when the firm of José Menendez & Bro. sold any 'La Favorita' flour, or where or when the firm of A. V. Ryder sold any 'La Favorita' flour. There was clearly, where the name of S. O. Ryder was added to the brand, no intention to palm off the goods of the defendants for those of the complainants; consequently no infringement of that which is of real value to the complainants, viz.: their firm name in connection with such other marks of grade or quality as they might choose to brand upon their barrels."

This Court, however, did not assent to the defendant's proposition, but held (p. 521), as follows:

"Holt & Co., then, having acquired the exclusive right to the words 'La Favorita,' as applied to this particular vendible commodity, it is no answer to their action to say that there was no invasion of that right because the name of S. O. Ryder accompanied the brand upon flour sold by appellants, instead of the name of Holt & Co. *That is an aggravation and not a justification*, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor. Gillott vs. Esterbrook, 47 Barb. 455; s. c. 48 N. Y. 374; Coats v. Holbrook, 2 Sandf. Ch. 586" (italics ours).

So, here, if this was Rahtjen's trade-mark, and was conveyed by him to the respondent, and was not aban-

doned, and the petitioner was not licensed to use it, then the petitioner had no right to appropriate it, even though it used it in connection with the name "Holzapfel" and the symbol of a propeller. It might well be presumed by the public, from the boldness of the operations of the petitioner, that it had been licensed by respondent to use the trade-mark. Such cases are not unknown.

As was said in the Menendez case, this was "an aggravation, not a justification."

If such be the law as regards the use of fanciful words (La Favorita), arbitrarily selected, it is much more so in regard to the unlawful use of the *name* of the person by whose efforts it has obtained its commercial value as a trade-mark.

Particularly is this so when the trespass cannot be justified on the ground, so often advanced in such cases, that the name is that also of the trespasser.

Under these circumstances the offense is more flagrant and the remedy should be more stringently applied.

This Court in the Hunyadi case held that liability for infringement of a label and bottle is not avoided by the infringer's use of an additional label which is a mere importer's private mark.

IV. Name Generic.

Petitioner contends that the name "Rahtjen's Composition" has become generic and therefore cannot be monopolized by any one. Strictly speaking, it would seem that the term "generic" is applicable to an unpatented article only. During the life of a patent the name or mark as truly indicates origin and ownership as if there were no patent. If the patent prove invalid the trade mark right is preserved, because there has never been a legal patent monoply to limit the duration of trade mark monoply. For example, in the case of

Sawyer vs. Kellogg (7 F. R., 720, 723), Mr. Justice BRADLEY says:

> "It is further suggested that the complainant has lain by for several years, whilst the defendant has been publicly using his own label, and has thus acquiesced in its use. To this suggestion it may be proper to reply that the complainant had a patent for the article of bluing, which he was prosecuting and endeavoring to substantiate, but in which he finally failed. His failure to establish his patent (which would have covered all his rights) ought not to preclude him from falling back on his right to the trade mark."

See also to like effect Lorillard vs. Wight, 15 F. R. 383.

The passing to the public of the exclusive trade-mark right with that of the patent would seem its simultaneous dedication by operation of law.

The adjective "generic" implies that the name or mark has lost, if it ever possessed, the quality of indicating mere ownership or origin of the goods to which it has been applied. In other words, that, when not a geographical or proper name, it has come in the minds of the public to indicate an article of trade, without suggesting who is its manufacturer, or that any individual in particular is its owner. Which implies that the article is manufactured or produced by several different parties, to whose several products the name is indifferently applied, to designate its character or quality, descriptively.

What evidence is there to show that in this case the name "Rahtjen's Composition" has become generic by common use by various parties? There is no proof that besides Rahtjen and his assigns any one save this petitioner has ever adopted or used the name.

If generic, then it is rendered so solely by the infringing acts of the petitioner. If this be a true principle, then every infringer can by his own wrong-

doing establish a defense against the penalty of such act, or, in other words, he can profit by his own wrong-doing. The mere statement of the logical effect of the petitioner's argument is its sufficient answer.

The petitioner called several witnesses to prove that its sales of paint, under the name "Rahtjen's Composition," in this country, were known to the public, and inferentially that the respondent probably knew of them. The testimony of these witnesses, however, proves to be of greater importance upon this point. The sum total of it is that they knew, not of general use by a large number of different parties of the name of "Rahtjen's Composition," so as to make the term a generic or descriptive one, but of sales of paint under that name by respondent and petitioner only. In other words, they testified to infringing acts of the petitioner which were unknown to respondent. For example, petitioner's witness, Coverly, says:

> "Q. 8. Do you know what kind of paints or compositions for painting the bottoms of vessels Donald & Co. (Petitioner's agents) or the defendant corporation have sold or used?
>
> "A. We have always understood that Mr. Donald sold to us Holzapfel's Rahtjen's Composition; Mr. Petersen (President of Respondent Company) Hartmann's Rahtjen's Composition" (Rec., p. 244).

To the same general effect is the testimony of Haffner (Rec., p. 247, Qs. 10–20);
Linnekin (Rec., p. 249, Qs. 4–13); and
Adair (Rec., p. 251, Qs. 5–13).

Note Adair's answers to questions 8–10:

> "Q. 8. How was the Holzapfel paint known which Donald & Co. handled?

A. How do you mean? The way that I know it there was two paints, the Hartmann and the Holzapfel's."

Q 9. State whether or not you ever knew of Donald & Co. ever handling a Rahtjen paint.

Objected to as leading.

A. Yes, when I knew it first it went under the name of Suter-Hartmann's.

Q 10. Did it go under that name when you knew Donald & Co. to be handling it?

A. At that time there was a Rahtjens manufacturing it and Holzapfels as well."

Also the witness Miller:

"Q. What paint did Donald & Co. supply?

"A. He supplied Rahtjen's paint, manufactured by Holzapfels" (Rec., p. 255, Q. 13).

This evidence shows that the petitioner *alone* had entered respondent's field of business and not the public generally. We submit that there is no authority for holding that the unauthorized invasion of the rights of the trade-mark owner by a single infringer can make the trade-mark generic in character.

V. The Hartmann Trade-Mark.

There are certain minor questions in respect to which proof was offered by the petitioner, and which were argued in the courts below, but which do not seem to be made grounds of complaint against the decision of the Circuit Court of Appeals. One of these is the assertion by petitioner that respondent's real trade-mark is the words "Hartmann's Manufacture" in connection with the symbol of a red hand.

This trade-mark was registered by the English corporation Suter-Hartmann & Rahtjen's Composition

Company, Limited, from which the respondent acquired its rights. (See Record, p. 211.)

This trade-mark does not contain the words "Rahtjen's Composition." It is merely a Hartmann trade-mark, and has been used by respondent and its predecessors in connection with its main trade-mark of "Rahtjen's Composition."

Petitioner claims that it has not used this additional and later trade-mark of respondent's and, therefore, has not infringed upon respondent s rights. The facts in reference to the use of these marks are briefly but accurately set forth in the opinion of the Circuit Court of Appeals.

In part repeating what we have before noted, we summarize them as follows:

"Rahtjen's Composition" was adopted by Rahtjen in 1865 as a trade-mark for his paint for ships' bottoms; said trade-mark has been used for that purpose continuously ever since by the Rahtjens and their associates; in 1870 the sale of this paint was begun, not only in the United States but also in England, in the latter country through the exclusive agency of Suter, Hartmann & Company, of London; the business in England grew to such proportions that a factory for the manufacture of the paint was established by the Rahtjens in 1874; subsequently, in 1880, this factory was turned over to Hartmann Brothers, together with the exclusive right to manufacture said paint for sale in Great Britain and the United States, under a royalty license; in 1888 the corporation of Suter-Hartmann & Rahtjen's Composition Company, Limited, was formed as the successor of the various copartnerships theretofore engaged in the business, and said exclusive rights were vested in it; during the period from 1871 to 1888 the business of manufacturing and selling the Rahtjen's paint was carried on under the trade-mark of "Rahtjen's Composition," and all of the parties engaged during that time as the agents and licensees of the

Rahtjen firm in England as well as the latter's agents in the United States—namely, Suter, Hartmann & Company, Hartmann Brothers, and Hartmann, Le Doux & Maecker—were firms in each of which one or more of the Hartmann family were copartners; and, therefore, the name "Hartmann" became and was during those years closely associated in this business with the name "Rahtjen;" after the manufacture of the paint in England was undertaken by Hartmann Brothers, the Rahtjens meanwhile manufacturing in Germany, it was deemed advisable to adopt a trade-mark which would indicate the paint of the Hartmann Brothers' manufacture, as a distinguishing symbol of their own, the paint being sold through the same agents as theretofore—namely, Suter, Hartmann & Co. and Hartmann, Le Doux & Maecker—in Great Britain and the United States, respectively; they therefore adopted the words "Hartmann's Manufacture" in connection with the symbol or representation of an open hand of red color; this trade-mark was registered in the United States Patent Office on September 17, 1889, No. 17,035 (see Rec., p. 211), by Suter-Hartmann & Rahtjen's Composition Company, Limited, which corporation had meanwhile become the successor of Hartmann Brothers and of the various other firms engaged in the business; the specification of the trade-mark states that the class of merchandise to which it is appropriated is "paints and painters' supplies," and the particular class of goods on which it is used is "paints, compositions, anti-corrosives and anti-foulers of all description," but as we have stated the name Rahtjen is not mentioned in the trade-mark; this mark has been applied by respondent and its predecessors, not only to Rahtjen's composition, but to all paints of their manufacture, including some not known as Rahtjen's composition which are used for the interior and unsubmerged parts of ships (see Dep. Peterson, Rec., p. 48, Re-d. Q. 301–5).

This disposes of the claim of the petitioner that the words "Hartmann's Manufacture" with the symbol of the red hand have been applied by respondent to Rahtjen's composition for the purpose of indicating them as such.

In this connection the statement of respondent's witness Peterson is exceedingly apt (see Rec., p. 48, answer to R-D. Q. 304):

> "Several years before the Suter-Hartmann & Rahtjen's Composition Company, Limited, was organized, the firm of Hartmann Brothers had the exclusive right to manufacture the Rahtjen's composition in England. The goods were marked with the words 'Hartmann's Manufacture.' This was to distinguish them from the composition manufactured by the Rahtjens in Germany. Then when the English Company was formed, they acquired the manufacturing rights and marked their goods in the same way. As the American Company buy the paste or base from the English Company, its manufacture is also marked with the same words, 'Hartmann's Manufacture.' These words are connected with a red hand; this is the symbol ordinarily used by the Hartmann Brothers in connection with the words, 'Hartmann's Manufacture.' This is as near a history of the case as I can give."

On the other hand, the use of the trade-mark, "Rahtjen's Composition," by respondent, has been confined to this particular paint for ships' bottoms, and has not been used on paints and materials for other purposes.

Unfair Competition.

This suit being for infringement of a trade-mark, of the actual adoption and use of which there can be no

doubt, the question of unfair competition is not involved. The petitioner, however, has attempted to avoid the consequences of its infringing acts by making it to appear that its competition has not been unfair. The law is too well settled to justify discussion, that in strict trade-mark cases a fraudulent intent to injure the complainant, or an actual misleading of the public, need not be proved, as it will be presumed.

In Menendez vs. Holt, cited, this court, by Mr. Chief-Justice FULLER, says, at page 523:

> "The intentional use of another's trade-mark is a fraud,"

and, also, that the use of subsidiary or identifying marks is an aggravation.

This language is quoted with approval by this court in the Hunyadi case, decided the present term.

In the Elgin Watch case (Elgin Natl. Watch Co. vs. Illinois W. C. Co., 179 U. S., 665), also of the present term, this court, by Mr. Justice BROWN, says, at page 674:

> "If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then if an infringement is shown, the wrongful or fraudulent intent is presumed."

However, unfair competition has been averred in the bill and included in the prayer for relief and supported by proofs. This proof is conclusive of the intention of petitioner in selling or offering for sale a spurious paint under respondent's trade-mark. The only conceivable reason which the petitioner could have for applying this trade-mark to its paint was to encroach upon the respondent's business and secure its customers. Petitioner has, in fact, sold to the United States Government as "Rahtjen's No. 1, or Anti-Corrosive Composition," and "Rahtjen's No. III. or Anti-fouling Composition," which are the designations for-

mulated and long used by petitioner, paint which was not of that origin, nor made according to the formulas of Rahtjen. (Petersen, Rec., pp. 18–32, Qs. 32–55. A. C. Holzapfel, Rec., 333, X-Qs. 76–78.)

This purpose is also apparent from the fact, as appears in the record, that the Rahtjen's composition of the respondent and its predecessors, has for many years been compounded by processes which are trade secrets. (Petersen, Rec., p. 40, X-Q. 254. J. Rahtjen, Rec., p. 154, Q. 523. Complt's. Ex. HH, Rec., p. 208.)

That the respondent and its predecessors employed secret processes in the manufacture of its paint has been well known to petitioner and its predecessors. (M. Holzapfel, Rec., p. 278, X-Q. 139. Schnitger, Rec., p. 308, X-Q. 140.)

Both of these last-named witnesses testified to their knowledge of secret processes long before petitioner established any regular business in the sale of paint under respondent's trade-mark in the United States. That petitioner's present processes are different from that of the British patent, which it claims it has followed in its manufacture, was admitted by defendant's chief witness, A. C. Holzapfel, who refused, however, to disclose what they actually were, claiming them to be trade secrets. (Rec., pp. 332–33, X-Qs. 74–79).

Not only did respondent many years ago and before the expiration of the British patent referred to, cease to use the formula disclosed therein and adopt others which it is still using as trade secrets, but the petitioner also has in like manner departed from the formula of the patent, and is also manufacturing under trade secrets. Hence petitioner has sold and offered for sale what it knows is different from respondent's goods while using respondent's trade-mark, which substitution is a deceit and fraud upon the public.

Decision of Court of Appeals.

The decision of the Court of Appeals which is now under review by this Court, briefly finds the facts to be true which we have above set forth in detail.

The findings and conclusions are as follows (p. 429):

> "The defendant's case rests mainly upon the position that after the forfeiture in 1880 of the English patent of 1873, the name Rahtjen's composition became generic in this country, and the article could be manufactured and sold in this country by any person who described himself as the manufacturer. Reliance is placed upon the case of Singer Manufacturing Co. v. June Manufacturing Co. (163 U. S., 169).
>
> It appears that the firm of John Rahtjen introduced their paint into this country in 1869 and preferred not to attempt to obtain the protection of a patent, but to gain both reputation and protection by the character of the article and for that purpose required that it should be sold as their product, and under a trade designation. That system has been continued by each owner of the business in this country until the present time, and the name of the inventor has become fastened upon the product. If a trade-mark exists in this country in the name of Rahtjen's composition, the complainant is the owner of it by virtue of the right of succession, as stated in the well known case of The Lepage Co. v. Russia Cement Co. (51 Fed. Rep., 941)" (Rec., p. 429). * * *
>
> "It further appears that after 1869, the only patent which was ever taken out in any country for the paint was the English patent of 1873, which lapsed by Hartmann & Brothers non-payment of dues in 1880. The asserted consequence is that because the name then became *publici juris*

in Great Britain it became public property everywhere. There was in 1880 a valid trade-mark right in the United States which Rahtjens and their successors had acquired. The lapse of the English patent neither broke this trade-mark, nor interfered with the title of its owners. They owned it, and although the lapse of the English patent interfered very seriously with their title to exclusive rights in Great Britain, it was ineffectual upon title in another country. In England the Rahtjens undertook to acquire exclusive rights by virtue of the patent laws. In the United States they had previously acquired exclusive rights by the common law. Their failure in England does not cause a cessation of their common law rights in the United States. The lapse of the English patent could not cause a lapse of trade-mark rights throughout the world.

The Singer case, *supra*, had exclusive reference to the continuance of a monopoly in this country upon which letters patent of this country had expired, and the court held that the right to use the name passed to the public in this country, with the expiration of the exclusive right created by the patent to make and sell the article. The decision followed the previous general course of decisions in the courts of this country and elsewhere, but it did not relate to the facts of this case, as obviously appears in the opinion of Mr. Justice WHITE, who spoke for the court."

The Court of Appeals, after referring to the language of this Court distinguishing the Singer vs. June case from the Scotch, English and French cases, says further (p. 431):

"We are not able to find from the record, as a fact, that in the United States the name Rahtjen's composition has become a generic name

and now means a composition made by any one after the original formula of Rahtjen. A few witnesses say that they supposed that the complainant and the defendant were competitors in the manufacture of an article called by the same name, but the testimony does not show that the fact exists in this country * * * that 'in the eyes of the public this name of Rahtjen has become a sort of qualifying adjective indicative of this special product.' * * * * * * * * * * * *

The defendant next insists that the complainant's laches should prevent any decree in its favor. It is true that the defendant has sold its manufacture of Rahtjen's composition to a certain extent since 1890, but the sales have been comparatively small, and did not interfere with the complainant's business to any marked extent until the defendant obtained a contract with the Naval Department of the U. S. Government in answer to a call for offers of 'Rahtjen's composition,' when suit was promptly commenced. The defendanst' chief brand of paint is the 'International composition,' and it has been their endeavor to sell that brand, if they could, 'and failing that, Rahtjen's composition.' The defense of laches is nominal rather than real, for the defendant's interference with the property rights of the plaintiff was, for many years, inconsiderable, and under no decision, merits a refusal of a decree of injunction."

Petitioner's Assignments of Error.

So far as error pertaining to the present issue may be said to be assigned in the petition, it may be summarized as follows, viz.:

(1) That the Court of Appeals erred in not holding that the name "Rahtjen's Composition"

became public property in the United States by reason of the expiration of the British patent to Rahtjen.

(2) That it erred in not holding that the name "Rahtjen's Composition" had become generic and had long ceased to denote the source of manufacture.

(3) That it erred in not holding that respondent was guilty of laches, and therefore estopped from maintaining this action.

(4) That it erred in holding that respondent had acquired a common law trade-mark in the United States in said name prior to the application for the British patent.

(5) That it erred in not holding that the disclaimer by respondent's predecessor of the exclusive right to the name "Rahtjen's Composition" in its application for registration of trade-mark in the British Patent Office estopped it from claiming such exclusive right in this country.

Our answer to the first three of these supposed assignments of error has already been given in our statement of the facts and the law applicable thereto. As to the fourth, the petitioner's position seems to be that, while it admits the establishment of business by Rahtjen in the sale of Rahtjen's composition, during the three years prior to the date of the English patent, yet that business

> "was not large enough, or conducted for a long enough period in the United States, for the said company (respondent) to have acquired a common law trade-mark in the United States prior to the application for the English patent" (Pet., p. 22).

We know of no rule of law which justifies or in any degree supports this claim. We do not understand that any specific length of time is required, during which

such a business must be conducted in order to establish priority. Certainly there is no rule that the owner of a trade mark shall do any specific *volume* of business in order to protect his trade mark. But even if both lapse of time and volume of business were material, we submit that the amount shown by the Gelien invoice book is certainly ample and the period of three years is unquestionably long enough for the requirements of this case. It was long enough in the Batcheller case cited.

In Kathreiner's Malzkaffee Fabriken mit Beschrankter Haftung, *et al.* vs. Pastor Kneipp Medicine Co., 82 F. R., 321 (C. C. A., 7th Ct., Oct. 4, 1897), the Court says :

> " It is * * * not necessary, in our judgment, that a trade in an article should be fully established, in the sense that the article be widely known, before the proprietor of its trade-mark or trade name may be entitled to the protection of equity for the preservation of his rights. Otherwise it might be impossible, with respect to a valuable and desirable article or product of manufacture, designated by a particular brand or in a particular manner, ever to establish a trade. Craft and cunning, discerning the value of the product, and the profit to be acquired, would, at the inception of the business, flood the market with spurious and cheaper articles or preparations of the similitude of the genuine, and strangle the trade in the genuine at its birth. It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to continue its production and sale. It is not essential that its use has been long continued, or that the article should be widely known, or should have attained a great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high

and general reputation, and of long continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the use of the trade-mark."

The Court then cites with approval from the case of Hall vs. Barrows (32 Law J., Ch., 548), which is of identical purport with the language above quoted, and then proceeds further as follows :

"The evidence here is satisfactory that the product in question was marketed in the United States first in the year 1891, and followed during the years 1892 and 1893 by other importations, not numerous, indeed, but so many and in such quantities as one would look for during the first years of the growth of an infant industry, and indicating the intention of the proprietor to actively occupy the market."

The Court held that the use of the trade-mark as stated was sufficient to establish the complainant's rights.

Applying this ruling to the case at bar, we submit that Gelien in the years prior to the date of the English patent had so established his business as to entitle him to appeal to a court of equity for the protection of the trade-mark, and hence the trade-mark had become so established as to be unaffected by the patent.

As to the fifth point that the common law trade-mark right in this country was sacrificed or abandoned by reason of the disclaimer filed by Rahtjen's English agents upon their application for registration of one of their trade-marks in England, we reply that it appears from the record that the disclaimer was required by the English Patent Office on the ground that the English patent

had expired and that the Office regarded the name "Rahtjen's Composition" for that reason public property in England (Schnitger, Rec., p. 303, Qs. 96–98). We think the applicants for registration were wrongly advised by their counsel in respect to the effect of the lapse of the patent upon their exclusive ownership of the trade-mark (W. Hartmann, Rec., p. 88, Re-d. Qs. 333 and 334). But aside from the question of bad advice or error of judgment, a proceeding of this character cannot be effective beyond the limits of the country in which the grant or registration is sought. It certainly requires no argument to show that the registration of a trade-mark in England cannot affect a common law trade-mark in this country, nor can the specific limitations of such registration in one country limit the scope or impair the validity of either the common law right, or the registration of a trade-mark in this country. The intention of the owners not to abandon their rights in the United States, is shown from the fact that only a few months later they registered the specific trade-mark involved in this suit was in the United States Patent Office (Rec., p. 210).

In the registration of trade-marks it is immaterial whether the registrant can become the exclusive owner of the trade-mark abroad.

> "The word "Germania" may be registered here as a trade-mark by a citizen of Germany, although the German statute makes no provision for registration of words as trade-marks." (64 O. G., 858. FISHER, Acting Commissioner :)
>
> "The word 'Goliath' may be registered as a trade-mark to a citizen of Germany, although that government would not register it, since this country, in the treaty between the United States and Germany, does not require registration in Germany

as a condition for registration here, and since although a German citizen cannot become the exclusive owner of a word in Germany he may do so in the United States " (53 Ms. D. 7, Fisher, Asst. Com.).

By analogous rule a prior foreign patent does not prevent the issuance of a broader American patent.

> " Where the same inventor who has obtained a patent from a foreign state subsequently makes an application for a patent in the United States, the monopoly he seeks is one essentially distinct in territorial limits from that which he has previously received, and therefore one which may yet be conferred upon him by the government within whose gift it still resides." (II. Robinson on Patents, Sec. 461.)

In Faure vs. Bradley, 44 O. G., 945 (Commissioner Hall), it was held that foreign patents containing limited claims will not bar an applicant from securing a patent in this country for a broader invention.

We submit that there is no force in any of the claims of the petitioner imputing error to the decision of the Court of Appeals.

The Dissenting Opinion.

It is proper in this connection to consider the grounds of the dissenting opinion of Judge WALLACE in the Court of Appeals.

The essential points in this opinion are:

FIRST. That the name was the generic description of a patented article and passed to the public with the lapse of the patent.

We submit that this point is fully answered by our showing of the history of the business in England

prior to the application for the patent, and that during the life of the patent the trade-mark continued to be applied to unpatented varieties of the paint as well as to the patented.

Also that the trade-mark ante-dated the patent and had a broader scope and use, and hence the value was obtained from the trade-mark and not from the patent, and the lapsing of the patent could not affect the exclusive ownership of the trade-mark.

SECOND. That the trade-mark has long ceased to denote the source of manufacture.

This statement is not borne out by the facts in the record. It is evident, as we have above stated, that the source of the paint sold in the United States during all these years was first the Rahtjen factory in Germany, and later the factory established by him in England, now belonging to the corporation of which he is a stockholder, and which bears his name. The only other source is that of the single infringer, whose acts are called in question by this suit.

THIRD. That the disclaimer of the English agents on their application for registration in England operated to destroy their rights in this country.

This point we have already discussed, and, we believe, satisfactorily disposed of.

So, also, have we attempted to meet and answer the claim of laches, and that the trade-mark is generic.

The only other point in the dissenting opinion which needs consideration, is the implied conclusion that it is impossible for a man to have in this country a trade-mark of which he is not the exclusive owner in other countries.

The mere statement of this point suggests the answer. The converse is recognized in the decisions of European courts, cited by this Court in the Singer vs. June case. In that case this Court held that the

exclusive right to the name given to the patented article lapsed with the patent, while the Courts in England, Scotland and France *where the article was not patented*, sustained the trade-mark, thus holding the exact contrary of the proposition laid down in the dissenting opinion. In effect they held that a man purchasing a Singer sewing machine made in this country by others than the Singer Company, would be enjoined by the courts of those countries from selling it there.

This Court, in the Singer vs. June case, recognizes the existence of continuing exclusive trade-mark rights in foreign countries after they have lapsed in this country. Why, therefore, should there be any distinction, or why should it be held that the converse may not be equally true, that a trade-mark lost in England by the lapse of the patent on the article to which it has been applied, may nevertheless continue the exclusive property of its original owner or his successors in this country ?

The case of J. & P. Baltz Brewing Co. vs. Kaiserbrauerei *et al.*, 74 F. R., 222 (C. C. A., 3d Ct., May 4, 1896), was a suit for the infringement of a common-law trade-mark. The complainant was a foreign corporation, having its principal place of business in Bremen, Germany. The defendant was a domestic corporation, located in Pennsylvania. Both manufactured and sold beer. The complainant claimed that it was the first to adopt and use the word "Kaiser" as a trade-name or trade-mark for the products of its brewery, and that from the time of its adoption and use, in November, 1874, it had continued to export its beer in kegs and bottles, labeled, marked and stamped "Kaiser Beer" to its agents in the United States. The proofs established the priority of use by the complainant of the word as a trade-mark in the United States. It also appeared that under the laws of Germany the word was not a lawful trade-mark in that country. Reference was made by the defendants' counsel to the trea-

ties between this country and Germany and Austria; the provision in the German treaty securing to citizens of Germany the same protection for their trade-mark rights in this country as citizens of the United States, and the Austrian treaty providing that, if a trade-mark has become public property in the country of its origin, it shall be equally free to all in the country of the other contracting party. The Court, in holding that the complainant had the exclusive right to the trade-mark in this country, says (p. 224):

> "It is suggested, rather than urged as an argument, that the term 'Kaiser' being open to common use in Germany and Austria—the laws of those countries in relation to trade-marks being substantially alike—no subject of either should be permitted to secure the exclusive right to the use of that term as a trade-mark in the United States. The German treaty was intended to secure 'the same protection' to German subjects doing business in the United States as is afforded to our own citizens; and it is not contended that one of the latter would be denied protection for a trade-mark under our laws simply because that particular trade-mark would not be allowed under the laws of Germany. The treaty stipulation only requires that the alien German should receive the same treatment as the American citizen. The provision of the Austrian treaty applies to a trade-mark which has become public property in the country of its origin. The trade-mark which is claimed by the complainant originated in the United States, and *has not become public property here.* It never was or could have been lawfully adopted as a trade-mark in Austria. As was said by this Court in Richter vs. Reynolds, 8 C. C. A., 220; 59 F. R., 580: 'It was not intended by these treaties to give to the official acts or laws of either country any peculiar extra-territorial effect.'" (Italics ours.)

It seems to be clearly recognized by this Court in the Hunyadi case, that a trade-mark may be lost to its owner in a foreign country and become public property there without affecting the rights in this country.

In that case, Saxlehner, the owner of the trade-mark "Hunyadi," by the decision of the Hungarian Minister of Agriculture, lost the exclusive right to the word in that country, and it was appropriated and registered there by others and used in combination with other words, such as "Matyas." In discussing the rights of Saxlehner in this country, in view of the defense of laches, this Court says (p. 35):

> "It appears that after the decision of the Minister of Agriculture in 1873 sustaining the claim of Markus to the trade-mark 'Hunyadi Matyas,' other springs were opened whose waters were bottled under different trade-marks, in all of which the word 'Hunyadi' was a component, and as early as 1886 these waters found their way to the United States, and were put on sale here with the knowledge of the Apollinaris Company. There is no evidence that Saxlehner had personal knowledge of these infringements, and while something may be said in his favor in view of his persistent efforts to established his rights in Hungary, he was bound to know the law in this country, and to take steps within a reasonable time to vindicate his rights. The infringers were making use of their trade-marks under licenses from the Hungarian Government, and we see no reason to doubt that they were proceeding in good faith to dispose of their waters under the trade-marks registered in Hungary. Under these circumstances, if Saxlehner had intended to assert his rights under the laws of this country, to the exclusive use of the word 'Hunyadi,' he was bound to act with reasonable promptness."

The holding of this Court that Saxlehner had lost his right of recovery because of laches is a clear recognition of the principle for which we contend—viz., that loss of a trade-mark in a foreign country does not invalidate it here, else there would have been nothing to be lost by laches. This is not affected by the fact that the provisions of the treaty between Hungary and the United States, irrespective of laches, terminated the trade-mark here. In the case at bar there is no treaty provision involved, and the Circuit Court of Appeals has found that there was no laches.

The analogy of patent law is in point here also.

Numerous domestic patents cover inventions not patented in foreign contries, and are upheld by our courts notwithstanding the dedication of the inventions abroad.

The scope of a domestic patent may be broader than that of a foreign one without affecting its validity.

The expiration or lapse of a foreign patent, unless prior to the domestic, does not affect the latter.

Hence, in any such case the rights of the patentee in this country are unaffected by the restriction or complete loss of them elsewhere.

So, too, a patented article cannot be imported and sold here without the consent of the patentee.

Boesch vs Gräff, 133 U. S., p. 697.

It follows that with patented articles there frequently exists the exact situation stated by his Honor Judge WALLACE, viz., that

> " any person here buying in Belgium, or elsewhere in Europe, or in England, the article [patented] can be prevented from dealing in it here."

Why should a different and more illiberal rule apply to a trade-marked article than to a patented one?

We submit that this reasoning of the learned Judge is not sound, and affords no valid ground for his dissenting opinion.

Foreign Decisions.

The petitioner, against the protest and subject to the objection of counsel for the respondent, introduced into the record testimony with reference to certain decisions in European courts, and copies from the records of such decisions. It also introduced in like manner and subject to like objection, a large amount of testimony and papers with reference to registration or attempted registration of various trade-marks in the English Patent Office. We respectfully submit that neither the records of foreign trade-mark registration proceedings, nor the records of proceedings and decisions in foreign courts should have been put in evidence, and, having been erroneously included, should not now be considered by this Court. All such matters are irrelevant and immaterial. Carlsbad vs. Kutnow, 35 U. S. App., 753.

But even if this Court should consider such matters as evidence, we respectfully submit that the statements and disclaimers of applicants for trade-mark registration, and the proceedings in reference to the same, can have no extraterritorial force, and cannot in any way, for the reasons which we have heretofore given, limit or impair prior established trade-mark rights in this country. The decisions in the Brussels and Hamburg cases were governed by the statutes of Belgium and Germany respectively, and cannot be determinative of any questions involved herein. In the Brussels case the Court simply considered the question whether the defendants had misled the public into the belief that the goods were actually made by Rahtjen or his associates. As we have before stated,

that question is not involved in this case, for the reason that fraudulent intent is presumed in the case of infringement of a trade-mark. In the Hamburg case the questions of intention to deceive and unfair competition were the only ones considered, and it appears clearly that the defendants escaped because there was at that time no law for the prevention of unfair competition in trade. Such a law, however, came into operation at a subsequent date. The consideration of the question of a trade-mark, pure and simple, as in the case at bar, was not involved in either case.

Damages.

After the granting of the petition for writ of *certiorari* in this case, the respondent promptly petitioned for a cross-writ for the purpose of bringing before this Court the question of its right to damages, as well as an injunction. Consideration of that question has been postponed until this hearing.

While the Circuit Court of Appeals decided in favor of the respondent, holding that "Rahtjen's Composition" is a valid trade-mark and is the property of the respondent; that the petitioner has infringed the same; and that respondent was not guilty of laches in bringing this suit, it nevertheless declined to direct a decree for an accounting. In view of the fact that the only reason for not ordering an accounting in a case like this is laches, it is hard to understand how the action of the Court below can be reconciled with its finding in favor of the respondent on the main questions. That Court, in its opinion, says (see Rec., p. 431:)

> "The defendant next insists that the complainant's laches should prevent any decree in its favor. It is true that the defendant has sold its manufacture of Rahtjen's composition to a certain extent since 1890, but the sales have been

comparatively small, and did not interfere with the complainant's business to any marked extent until the defendant obtained a contract with the Naval Department of the U. S. Government in answer to a call for offers of 'Rahtjen's composition,' when suit was promptly commenced. The defendants' chief brand of paint is the 'International composition' and it has been their endeavor to sell that brand, if they could, 'and, failing that, Rahtjen's composition.' The defense of laches is nominal rather than real, for the defendant's interference with the property rights of the plaintiff was, for many years, inconsiderable, and, under no decision, merits a refusal of a decree of injunction. Under all the circumstances of the case, we are not inclined to direct a decree for an accounting."

We respectfully submit that the finding of the court on the question of laches does not support its refusal to decree an accounting. We are aware of no case in which an accounting has been denied where the court has not found as a fact gross laches as the reason therefor. We, therefore, urge that if this court shall sustain the main conclusions of the Court of Appeals, it also grant to respondent an accounting.

But, even if this Court shall find that there was such laches on the part of respondent in bringing its suit, that it must be deprived of an accounting for infringing sales prior to suit, we can see no reason why it should be deprived of an accounting from the date of bringing suit. We presume the thought in the mind of the Court below was that a refusal of an accounting for defendant's "inconsiderable" interference with complainant's rights, would be a fair set-off against the overruling of its "nominal" defense of laches, but this surely cannot apply to the continued and serious interference which has taken place since

the filing of the bill. This Court has said in Menendez vs. Holt, at 524, on the question of laches:

> "Acquiescence to avail must be such as to create a new right in the defendant (citing case). Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' * * * So far as the act complained of is completed, acquiesence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

This language was quoted and approved in the Hunyadi case.

Where a defendant has committed infringing acts after notice of the complainant's assertion of his exclusive rights he cannot be heard to object to the proper penalty for such acts, whether injunction or damages. In Edison Elec. L. Co. vs. Sawyer Man. E. Co., 53 Fed. R., 592 (C. C. A., 2d Circuit), the patent was on the Edison incandescent lamp, and the defendant manufactured such lamps and supplied them to central-station lighting companies using central station apparatus supplied by competitors of the Edison Company. Their business depended absolutely on their ability to secure lamps. The patent had been sustained in the Circuit Court in another suit. The defendant had continued its infringing acts after that decision, and opposed the granting of a preliminary injunction for reasons stated in the opinion. The Court says, at page 597:

> "Every one of the manufacturing corporations, the competitors of the Edison companies, com

menced their operations with a knowledge of the existence of the patent in suit. They were controlled by business men of intelligence and experience. Their promoters and managers may have believed, and probably did, that the patent could not be successfully maintained but they entered upon the business with an understanding of its risks, and of the consequences which would befall them as infringers, if the patent should be sustained. None of them can now be justly heard to say that an injunction which is essential, if not indispensable, to the protection of the owners of the patent and their licensees ought not to be granted because of the great pecuniary loss which may result. If, in consequence of being deprived of the use of the lamps, their investments in other electrical apparatus will be greatly depreciated, they must take the consequences. * * * As to those users, * * * who have acquired these plants subsequent to the decision of the Circuit Court, if they are deprived of the use of the lamps, and as a consequence the value of their plants may be greatly impaired, they must accept the result as a consequence of their own imprudence."

This decision is much more far reaching than the rule which we seek to have applied to the point under consideration. The defendant in the case cited was subjected to the severity of the rule therein laid down, although it was not a party to the suit, on the decision in which the order for injunction was based. On the other hand, in the case at bar, the defendant-petitioner had the most formal and effective notice of the rights of the complainant-respondent in the commencement of suit. If a defendant can be held with the strictness of the rule in the Edison case cited, assuredly the petitioner ought to be held to account for its infringing acts, at least since the commencement of suit.

This principle is stated by Bispham as follows:

> "It is to be observed, moreover, that after bill filed the defendant proceeds at his peril, and has no ground to complain, if, by decree, he is compelled to undo that which has been done after the institution of the suit" (Campbell P. P. Co. vs. Manhattan Ry. Co., 49 F. R., 930; Thompson-Houston Co. vs. Union Ry. Co., 78 F. R., 365; Williams vs. R. W. & O. Ry. Co., 2 F. R., 702; Bispham, Eq. Jur., Sec. 404, p. 517).

It is well settled that a writ of injunction carries with it, as incident to it and as part of the relief, the right to damages.

> "A complaint seeking to enjoin the maintenance of an elevated road in front of plaintiff's property, and for damages caused by its maintenance, contains but one cause of action; the recovery of damages being incident to the relief by injunction (Shepard vs. Manhattan Ry. Co., 117 N. Y., 442–48; Henderson vs. N. Y. C. & H. R. R. Co., 78 N. Y., 423; Williams vs. Same, 16 N. Y., 97; Beach on Injunctions, Sec. 1400; see, also, Sec. 10)."

A patent case exactly in point is that of Canton S. R. Co. vs. Kanneberg, 51 F. R., 599 (601), in which Circuit Judge TAFT states the law as follows:

> "The right to an injunction rests, not on past infringements, but on anticipated and threatened infringements. The bill avers reasonable ground for fearing future infringements, and the stipulation fully sustains the averment. A failure to show infringements prior to the filing of the bill is unimportant in its effect upon complainant's rights, except upon the question of damages. The right to recover damages for the infringements between the

filing of the bill and the final injunction is incidental to the right to the injunction, and is required to make the remedy complete."

We, therefore, submit that when respondent brought suit, petitioner was thus duly notified of its claim to the exclusive right to the trade-mark in question, and that thereafter petitioner proceeded at its own peril.

If respondent has the right to an injunction now, it had the right to one at the commencement of the suit.

This fact would seem to entitle it to the fruits of all infringing business of the petitioner since that date.

Therefore, respondent should, in any event, be granted an accounting for damages accruing since the commencement of suit.

Conclusion.

We submit in conclusion:

First. That Rahtjen invented in Germany between 1860 and 1865, certain formulas for the compounding of paint for ships' bottoms, for which he adopted and used the name "Rahtjen's Composition," and which under this name speedily acquired a high reputation in the maritime world.

Second. That in 1869 he appointed a sales agent for said paint in the United States, and stipulated as a condition of the agency that it should be sold under the name "Rahtjen's Composition", and commenced shipping his paint under said name into the United States in 1870, and at about the same time also into England.

Third. That Rahtjen advised his agent at the time of his appointment (November 1869) that he intended not to patent the paint in the United States, which intention was carried out, no such patent having ever been obtained.

FOURTH. That after Rahtjen's death in 1873, his business in the United States, Germany, and England was continued by his sons, John and Heinrich, under the firm name of "John Rahtjen," which business has ever since been carried on without interruption by said firm in Germany, and in this country and in England, by said firm and its business successors, with which successors the Rahtjens have always been connected either as principals, or as stockholders and directors.

FIFTH. That the business of respondent and its predecessors has always been the sale and use in the United States of said paint manufactured by Rahtjen or his successors, first in Germany and later in England, and has been continuous and uninterrupted and in increasing volume, and the name "Rahtjen's Composition" has always characterized the business and marked and identified the paint.

SIXTH. That on November 29, 1873, Heinrich Rahtjen, a member of the Rahtjen firm, obtained an English patent, which expired in 1880, on one formula for said paint; that there were then, and ever since have been, other formulas for other varieties of the paint to which the name "Rahtjen's Composition" was and has been applied as well as to the patented formula, before, during and after the patent; that a regular and substantial business in the paint had been carried on in the United States (and England as well) for years before the application for the patent, and that the business acquired value from the name and not from the patent.

SEVENTH. That about 1890 petitioner began to import and sell paint in the United States under the name of "Rahtjen's Composition," but that its leading brand, which has always characterized its business, is "International; that its sales of Rahtjen's composition were small and did not interfere with respond-

ent's business until in June, 1898, when it bid for and obtained a Government contract for supplying Rahtjen's composition, whereupon respondent promptly commenced this suit, and that it does not appear that respondent had knowledge of any sales by petitioner prior to that date.

EIGHTH. That the name "Rahtjen's Composition" is not descriptive of the article; that it is not generic, since the petitioner is the only party except respondent who is shown to have used it; that it is a valid trade-mark; that it belongs to respondent, and that it has not been abandoned.

NINTH. That the grant of a foreign patent upon an article sold under a trade-mark does not affect the trade-mark in this country.

TENTH. That petitioner has infringed respondent's trade-mark, and that its use of subsidiary marks in connection with the trade-mark does not palliate its offense.

ELEVENTH. That respondent was not guilty of laches in bringing suit, but was prompt and diligent in asserting its rights.

TWELFTH. That, therefore, respondent is entitled to an accounting at least for damages since suit brought, because the commencement of the action was notice to petitioner of respondent's claim, and thereafter it continued its infringement at its own peril.

THIRTEENTH. That, hence, the decree of the Circuit Court of Appeals should be affirmed as to the injunction, and reversed as to an accounting.

Respectfully submitted,

TIMOTHY D. MERWIN,
THOMAS B. KERR,
Counsel for Respondent.

New York City, April 10th, 1901.

APPENDIX.

As printed in the record of this Court, the real significance of some of respondent's exhibits is lost. This is because plain Roman type is used in printing respondent's trade-mark, which in the original exhibits is made the dominating feature, as it ought to be, to give it the significance it possessed in the literature of the business and as actually used. In order, therefore, to present these exhibits with proper force, and in convenient form for the consideration of the Court, we have had lithographic reproductions made of the more important ones, and have arranged them in their proper chronological order as an appendix to our brief.

To make the narrative complete, we have printed, to precede the lithographs, the letter from Rahtjen to Gelien, dated November, 1869, which marked the inception of the business of the respondent. The several exhibits appear in the following order:

1. Exhibit Q.—Letter of Rahtjen to Gelien, November, 1869.
2. Exhibit R.—Gelien's show card of 1871.
3. Exhibit UU.—Certificate of copyrighting of the show card, August 5, 1871.
4. Exhibit U.—Letter-head used by Gelien during his agency, 1870-1877.
5. Exhibit T.—Circular announcing the agency of Hartmann, Le Doux & Maecker, of 1878.
6. Trade-mark "Rahtjen's Composition," registered June 23, 1885.
7. Exhibit CC2—Notice of dissolution of partnership of Hartmann, Le Doux & Maecker, July 1, 1886.
8. Exhibit CC1—Announcement of agency of Maecker to succeed Hartmann, Le Doux & Maecker, July 1, 1886.

9. Exhibit LL—Bill of Maecker to Clark for Rahtjen's composition, October 19, 1887.

10. Exhibit MM—Bill-head used by Clark during his local agency under Maecker.

11. Exhibit RR—Notice of agency of Peterson succeeding Maecker, January 29, 1889.

12. Telegraphic order for Rahtjen's composition, April 27, 1892.

13. Press copy of bill for same, April 27, 1892.

14. Press copy of bill for Rahtjen's composition, May 2, 1892.

15. U. S. Government requisition for Rahtjen's composition, June 30, 1893.

16. Exhibit KK 1 and 2—Photographs of stencils of Rahtjen's composition used prior to 1883.

17. Exhibit KK 3 and 4—Photographs of stencils of Rahtjen's composition used from 1883 to 1891.

18. Stencils Rahtjen's composition used by respondent since 1891.

Exhibit "Q."

[Translation.]

BREMERHAVEN, November ____, 1869.

MR. HENRY GELIEN,
Hoboken :

Referring to my letter of the 1st of October of the present year, I revert by these presents to the contents of your favour of the 9th September of the present year.

It appears from enquiries made that it will be difficult in the United States to obtain a patent for my paint, one of the reasons for this being that my paint contains some ingredients which are already known as components of paints and the Patent Office will prob-

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ably object to this and reject the application for the patent. But in my opinion it is better to forego the patent rather than to apply for a patent and receive a refusal.

With a view however, to introducing my paint there, notwithstanding, we can try this without taking out patent there being no immediate danger of any exact imitation of the invention (several competitors here and elsewhere have attempted to bring on the market an article similar to mine, but all consumers have rejected it for want of durability).

As you are perhaps already aware my composition paint exists in two qualities No. 1 being used as a first coat on bottoms and on all articles of iron ; it protects chiefly against rust and is in every case to be used like Mennie.

The paint No. 2 is only used as last coat of the bottoms ; it protects mainly against incrustation and accumulation. In order to introduce my composition paint there I quote the following terms :

(1) The paint shall be brought on the market under the name of " Rahtjen's composition."

(2) You shall have the exclusive sale there on condition that you shall not attempt to sell a similar, imitated paint of my competitors, at the same time.

(3) I quote you the price for No. 1 gold P. at 20.— for No. II. gold P. at 28.—per cwt. of 100 pounds German weight, if delivered in barrels including cooperage, if delivered in tins the cooperage is charged at cost price, the price is f. o. b., three months' credit.

I beg you to give me your opinion hereon and expect to hear from you at your earliest convenience.

Believe me, yours obediently,

JOHN RAHTJEN,
H. RAHTJEN.

RAHTJEN'S COMPOSITION PAINTS,

KNOWN AS THE

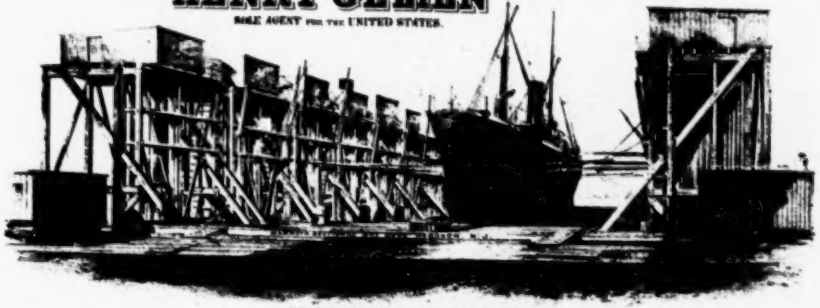
GERMAN PAINT

FOR PAINTING THE BOTTOMS OF IRON & WOODEN SHIP'S & BOATS.

TO PREVENT RUST, BARNACLES &c.

HENRY GÉLIEN

SOLE AGENT FOR THE UNITED STATES.



REFERENCES:

MESSRS. GELRICHS & CO., 2 Bowling Green, New York, or the CAPTAINS OF THE NORTH GERMAN LLOYD STEAMERS in Port, in New York, Baltimore, or New Orleans.

OLD DOMINION STEAMSHIP CO.,	Pier 37, N. R., New York.	MESSRS. C. H. MALLORY & CO.,	133 Maiden Lane, New York.
NEW YORK AND NORWICH TRANS. CO.,	" 40, " "	MESSRS. H. B. CROMWELL & CO.,	86 West Street, "
BRIDGEPORT STEAMBOAT CO.,	" 25, E. R., "	WILLIAM P. CLYDE, ESQ.,	119 Wall Street, "
DELAMATER IRON WORKS,	13th St., N. R., "	HERMAN WINTER, ESQ., Chief Engineer, Metropolitan & Old Dominion S.S. Co.	
HARLAN & HOLLINGSWORTH COMPANY,	Wilmington, Delaware.	THOS. M. RICHARDS, ESQ.,	Port Richmond, Philadelphia.

SINCLAIR STUART, ESQ. Underwriters' Inspector and Surveyor of Steamboats, &c., &c., - - New York Lloyds, 76 Wall Street, New York.

OFFICE AND DEPOT,

P.O. BOX 92. **107 WASHINGTON STREET, HOBOKEN, N. J.**

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A[1]

1871. No. 73821 B. Complainant Exhibit U U

Library of Congress, to wit:

Be it remembered,

That on the fifth day of August, 1871,
Henry Gelien
Hoboken, N. J.
has deposited in this Office the title
of a print the title or description of
which is in the following words, to wit:

Bahtjin's Composition Paints.

the right whereof he claims as proprietor in conformity with the laws of the United States respecting Copyrights.

A. R. Spofford
Librarian of Congress.

I hereby certify that the foregoing is a true copy of the original record of copyright. In witness whereof the seal of the Librarian of Congress has been hereto affixed this thirteenth day of October, 1899

Office of the Register of Copyrights,
Washington, D. C.

Written 10-9-99
Entered 10/10/99
Issued Oct. 13, 1899

Form A.

Herbert Putnam
Librarian of Congress.

By Thorvald Solberg
Register of Copyrights.

Complainants Exhibit D.

RAHTJEN'S COMPOSITION PAINTS

Known as the

GERMAN PAINT.

OFFICE OF

HENRY GELIEN,

SOLE AGENT

155 MAIDEN LANE.

(1)

New York July 14th 1871.

1089T

Complainants Exhibit T.

Alex Rudgway
Notary Public.

New York, April 23d, 1878.

Office 122 Front Street.

Having been appointed Sole Consignees in the United States

of Rahtjen's Patent Composition

for Coating Ship Bottoms, by Mr. Rahtjen of Bremerhaven, the Inventor and Manufacturer, we have the honor to inform you that we have this day established ourselves under the Firm of

Hartmann, Le Doux & Maecker.

Requesting your kind attention to the Signatures at foot,

We are,

Your Obt.

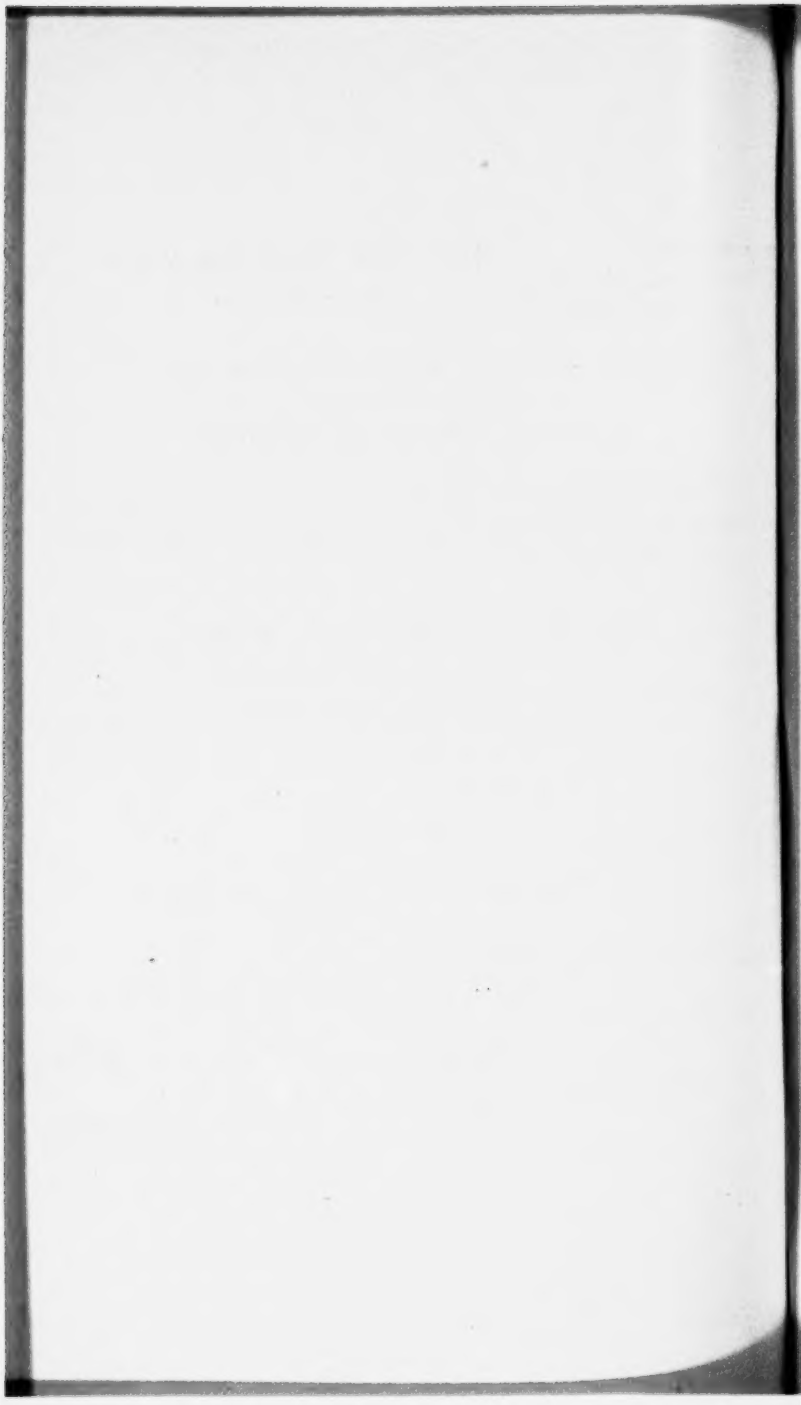
Yours respectfully,

Hartmann, Le Doux & Maecker.

Mr. William Hartmann will sign: Hartmann & Maecker

Mr. Richard le Doux will sign: Hartmann, le Doux & Maecker

Mr. Emil Maecker will sign: Hartmann, le Doux & Maecker



Complainant's Exhibit Trade Mark Rahtjen Composition.

TRADE-MARK.

HARTMANN, LE DOUX & MAECKER.

PREPARED PAINT.

No. 12,336. Registered June 23, 1885.

RAHTJEN'S COMPOSITION.

WITNESSES:

F. M. Antle.

E. Sedgwick

Hartmann, Le Doux & Maecker

BY Munn & Co

ATTORNEYS.

HARTMANN, LeDOUX & MAECKER,
NEW YORK.

Complainant's Exhibit CC.
Alex Duncan
Notary Public

134 PEARL STREET,

New York, 1st July, 1886.

We have the honor to inform you, that the partnership hitherto existing between us, has been dissolved by effluxion of time and by mutual consent.

Mr. **EMIL MAECKER**, will carry on the business at **127 Pearl St., N. Y. and 127 Scholes St., Brooklyn, E. D.** on his own account and will represent **Messrs. SUTER, HARTMANN & CO.**, of London, as agent for America for the sale of **RAHTJEN'S ANTIFOULING COMPOSITION.**

Yours respectfully,

William Hartmann,
Richard le Doux,
Emil Maecker.

127 PEARL STREET,

New York, 1st July, 1886.

Referring to the enclosed circular, I beg to inform the patrons of my late firm, Hartmann, le Doux & Maecker, that I have made arrangements with **Mr. D. CLARK**, of 356 South St., City, for the retail trade of **RAHTJEN'S COMPOSITION**, and request them to apply to him in regard to contracts for scraping and painting in the docks of this city and vicinity.

Mr. Clark who is well known in the ship-painting trade, will give your valued orders that prompt and careful attention which my late firm always bestowed upon them.

Respectfully yours,

Emil Maecker.

1086

KEMBLE BUILDING.
15 & 25 WHITEHALL ST.,
Room 124. NEW YORK. October 14th 1887

Mr. D. Clark 256 South St.
City

Bought of Jas. McGeehan

RAHTJEN'S COMPOSITION

1 Spruce Antifouling R @ 10½	@ 45c ℔	4725	
Less 25%		1181	℔ 25 441

Net.

Thos. Rahtjen's Sons

Complainant's Exhibit No. 1.

New York, 189

Or. to DAVID CLARK.

HOUSE, SHIP, YACHT AND STEAMBOAT PAINTING,

Telephone Call, Courtlandt 477. No. 256 SOUTH STREET.

Complainant's Exhibit No. 2.

Compliments Exhibit R.R.

B.R.R. Jany 29 9

Messrs Darrah & Elwell

Philadelphia

Gentlemen

I received through Mr Maecker at about 3 P. M. this day, an order from you for five Drums Printing & 5 Drums Anti-fouling (Rahtjen's Compositions) Paint, which I immediately shipped for Penn R R & your address, according to instructions. I herewith beg to inform you that I have been appointed sole agent for Rahtjen's Compositions, and shall hereafter be pleased to fill your orders promptly, upon the same terms as Mr Maecker has done. Enclosed please find Bill, and receipt for same.

Respectfully Yours
Otto F Petersen

P. S. Not able to send you Shipping receipt this Evening will send it by to morrow's mail

OFP

Complainant's Exhibit Telegraphic order of April 27. 1892.

THE WESTERN UNION TELEGRAPH COMPANY.

JNO. T. ECKERT, General Manager. MARVIN GREEN, President.

B C My No 3 1K 27 Paid

RECEIVED at PRODUCE EXCHANGE, NEW YORK.

April 27 1892

Dated New London Conn 27

To Otto L Peterson

120 Eme Twenty Broad St

My

Ship Twelve gallons Raheyns

Composition

Darrow & Comstock

Complainant's Exhibit press copy of bill of April 27. 1892.

April 27th 92

Mess^rs Darrow & Comstock New London Conn

1 Barrel 10 gross No 3 Rubbjuice Composition @ 4.00 $ 47.25

Less 15 % 7.08

$ 40.17

10880

Complainant's Exhibit press copy of bill of May 2, 1892.

B.B. Exr

J. 53

May 2d 2

U S. Navy Yard Brooklyn N.Y.

100 gallons No 1 Rahtjens Composition @ 3.00 300.
40 " No 3 " do @ 4.00 160.
460.

U. S. Navy Pay Office.
STEWART BUILDING,
280 Broadway,
New York

June 10 1893

Rahtjens Am Co

Please furnish the NAVY YARD, New York, for immediate use, subject to usual inspection at that Yard. Appropriation for Requisition No. 474, Bureau of C & R, to be delivered promptly in conformity with your proposal dated June 16.

ARTICLES REQUIRED.	PRICE. Dollars	Cents	FOR AGGREGATE AMOUNT.
For U. S. S. "Bancroft"			
31 1/2 Gallons of Rahtjens anti-corosive composition # 1 for ships bottom.	3 50 gal		
21 Gallons of Rahtjens anti-fouling composition # 3 for ships bottoms	4 50 "		
To be delivered in cans of 10 1/2 Gallons.			

Dobell Doyle 75
Dobe delivered Portsmouth already

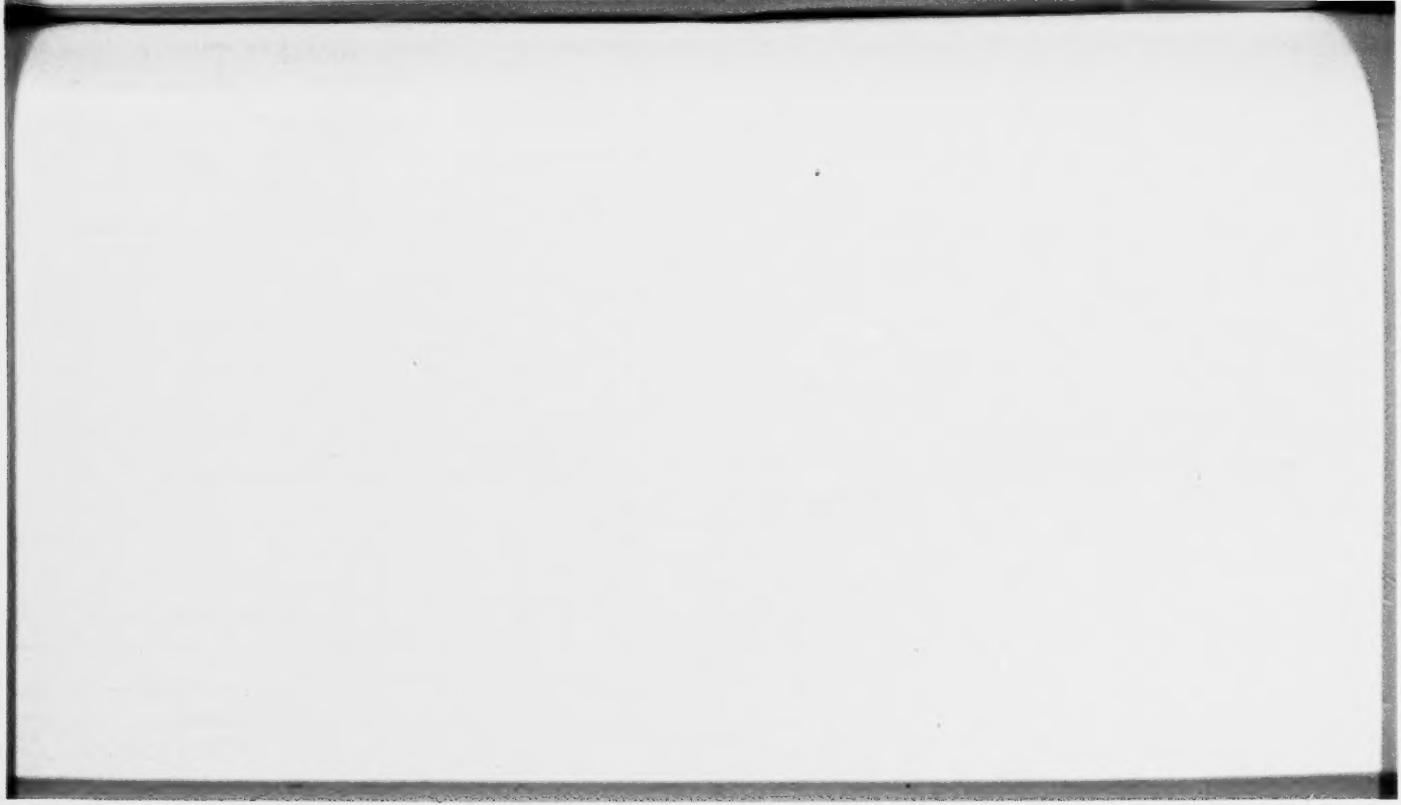
Complainant's Exhibit U. S. Government requisition of June 10, 1893.

B.B. Exr

Send Duplicate Bills to this Office for my Certificate, after which deliver them at the Navy Yard with the articles.

L. G. BILLINGS.
Pay Director U. S. N.

10891



Complainants Exhibit FF

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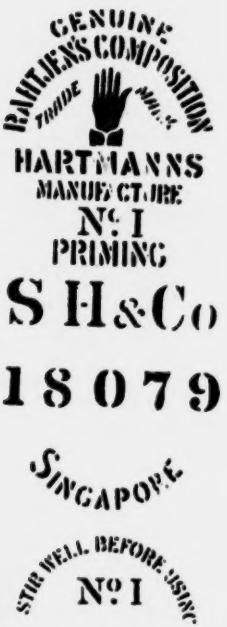

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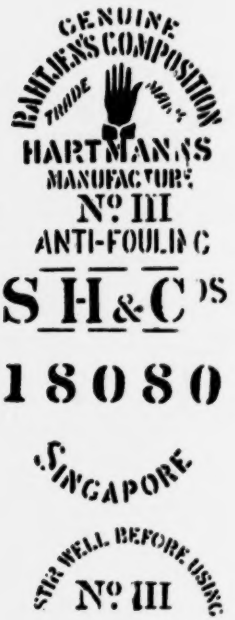
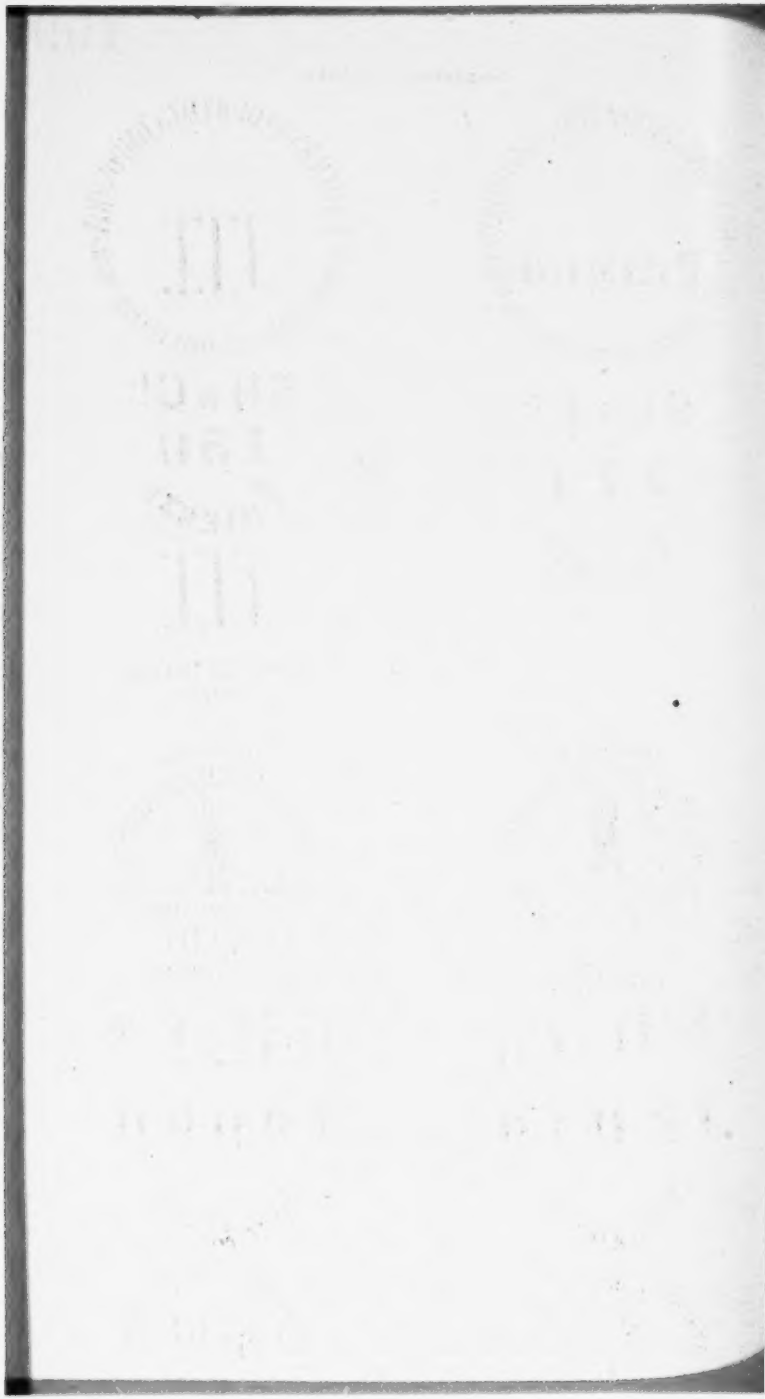




N. N.

GENUINE
RAHTJEN'S COMPOSITION
TRADE MARK

RAHTJEN'S
AMERICAN COMPOSITION
COMPANY.

NEW-YORK

HARTMANNS
MANUFACTURE
PRIMING
FIRST COATING

7140

10393

N. N.

GENUINE
RAHTJEN'S COMPOSITION
TRADE MARK

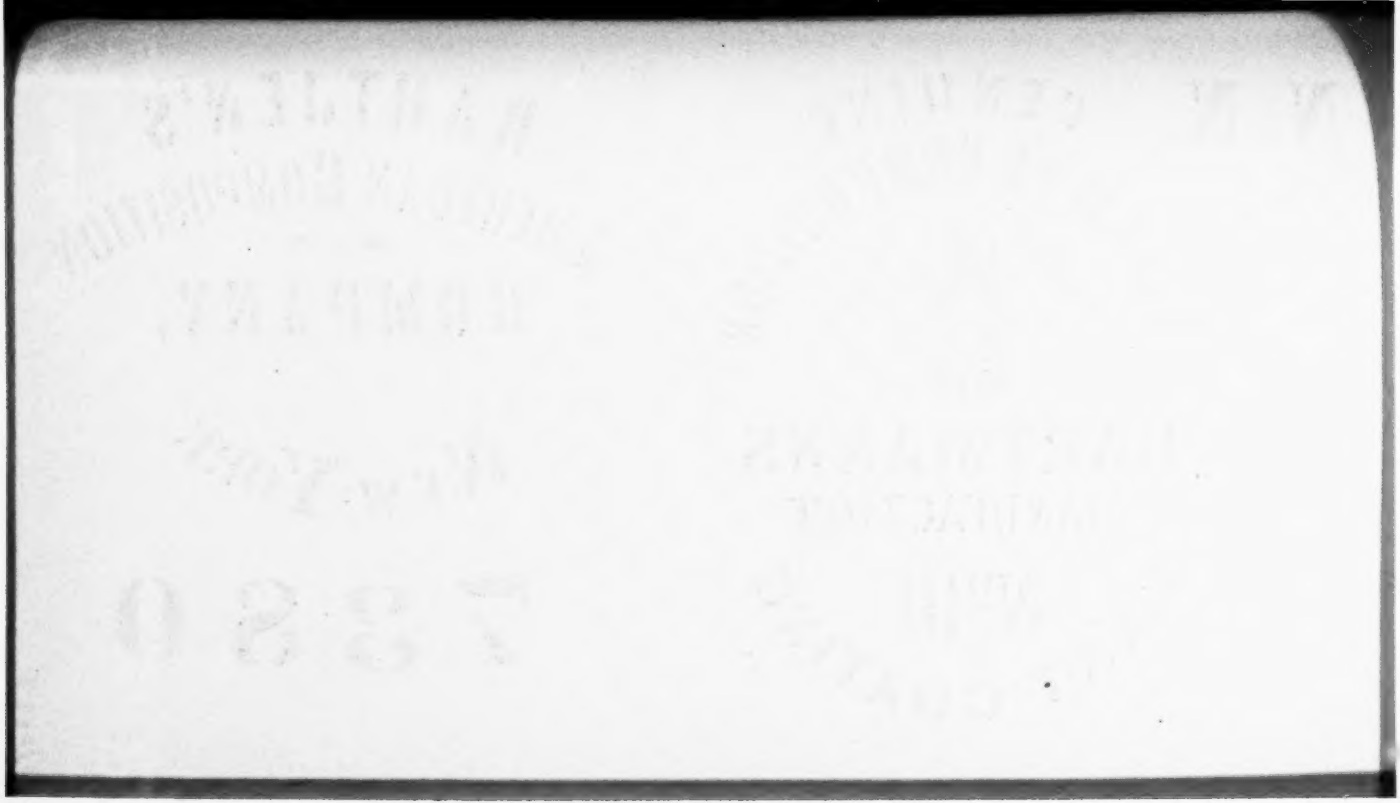
HARTMANNS
MANUFACTURE
Nº III
LAST COATING

RAHTJEN'S
AMERICAN COMPOSITION
COMPANY.

NEW YORK

7380

10334



No. 267, 54
Sup. Ct. Off. of Merwin & Kerr for Resp.
FILED
MAY 1 1901
CLERK.

Filed May 1, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Supplemental Brief for Respondent.

TIMOTHY D. MERWIN,
THOMAS B. KERR,
Counsel for Respondent.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 267.

HOLZAPFEL'S COMPOSITIONS COMPANY (LIMITED),
Petitioner,

vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

Submitted by leave granted at the hearing.

IN ANSWER TO ORAL ARGUMENT OF HON. J. G. CARLISLE, COUNSEL FOR PETITIONER.

The distinguished counsel for petitioner in his oral argument raised certain questions now advanced in this litigation for the first time. We understand his points to be as follows:

FIRST. That a foreign manufacturer, who imports his wares into this country under a trade-mark applied in the foreign country and sells the same through

agents here, cannot thereby acquire a domestic trade-mark, but that in order to secure trade-mark rights here such wares must have the mark affixed to them in this country; and hence that Rahtjen acquired no domestic trade-mark, although it is proven and admitted by petitioner's counsel that his paint was marked abroad, first in Germany and afterwards in England, with the name "Rahtjen's Composition," and was received, sold and used under that name by his agents here.

SECOND. That the selling agent in this country of a foreign manufacturer cannot himself acquire a domestic trade-mark in the name applied to the article by his principal in the foreign country; hence, that neither Gelien nor Hartmann, Le Doux & Maecker acquired any right to the name "Rahtjen's Composition" as a domestic trade-mark, and the registration of that name in this country by the latter was a nullity.

THIRD. That Rahtjen's shipments to his agents in the United States from his English factory after 1879, were in conflict with the business previously established by shipments from his German factory, and constituted forfeiture or abandonment of his trade-mark rights, if he had acquired any, in this country.

FOURTH. That the disclaimer of the exclusive right to the name "Rahtjen's Composition" and other words by Suter, Hartmann & Co. in the registration of their autographic signature as a trade-mark in the English Patent Office, worked abandonment of any previously-existing trade-mark rights of Rahtjen the world over.

FIFTH. That the petitioner's predecessors beginning with 1883 imported into, and sold in, the United States, a paint marked with the name "Rahtjen's Composition," and thereby established anticipating public use of the name prior to any legal adoption or use of it by the respondent or its assignors.

The conclusions sought to be drawn from these propositions are, that during the period of Rahtjen's importation of paint from Germany into this country he had nothing more than his German trade-mark; that even if he did acquire any domestic trade-mark rights during that period, he forfeited and abandoned them by ceasing such importations and commencing importations from his English factory; that in any event they were lost to him when he lost his German trade-mark, which was held by the Court in Hamburg to be the result of the lapse of the English patent; that he did not acquire any domestic trade-mark rights by reason of his importations from the English factory for the reasons already given, even if the lapse of the English patent did not work a forfeiture of his trade-mark rights throughout the world; that the importation and sale of paint as described by petitioner's predecessors in the United States, established public use of the claimed trade-mark in this country and prevented its exclusive use thereafter by any one; and that whatever may have been the legal effect of any and all of these precedent transactions, the disclaimer by Rahtjen's agents, Suter, Hartmann & Co., terminated any then-existing trade-mark rights of Rahtjen in this country.

1. The first proposition laid down by counsel for petitioner is, we think, without foundation in law. This is shown by cases cited in our main brief, as follows:

In the *Hunyadi* cases, marks applied to goods of foreign origin in the foreign country, and under which they were marketed in this country, were treated as having the same legal force and effect as if they had been applied to the goods in this country.

In the case of *Kathreiners Malzkaffee Fabriken mit Beschaenkter Haflung et. al. vs. Pastor Kneipp Medicine Co.*, 82 F. R., 321 (C. C. A. 7th Ct., Oct. 4th, 1897, cited on p. 45 of our main brief) the Court sustained the exclusive right of the complainant in this country to trade-marks applied to their goods in Germany.

In the case of *J. & P. Baltz Brewing Co. vs. Kaiserbrauerei et. al*, 74 F. R., 222 (C. C. A. 3d Ct., May 4th, 1896, cited on p. 50 of our main brief), the Court states the facts as follows:

> "This is a suit for the infringement of a common law trade-mark. The complainant is an alien corporation, having its principal place of business in the City of Bremen, in Germany. The defendant is a domestic corporation, located in the State of Pennsylvania. Both parties are engaged in the business of manufacturing and selling beer. The complainant complains that it was the first to adopt and use the word 'Kaiser' as a trade-name or trade-mark for the product of its brewery, and that from the time of such adoption and use, in November, 1874, it has continued to export its beer in kegs and bottles, labeled, marked or stamped 'Kaiser Beer,' to its agents in the United States, where it has acquired a large and lucrative sale. The bill charges that the defendant makes and sells an article called 'Kaiser Beer,' which comes into unlawful competition with the beer of the same name manufactured and sold by the complainant. The proofs establish the fact of the priority of use by complainant of the word 'Kaiser' as a trade-mark in the United States."

The same rule is recognized in the case cited in the opinion in Baltz vs. Kaiserbrauerei to wit: *Richter vs. Reynolds*, 8 C. C. A., 220; 59 F. R., 580.

Similarly in the case of *La Republique Francaise, la Campagnie Fremiere de L'Etablissement Thermal de Vichy vs. The Saratoga Vichy Springs Co.*, (decided in the United States Circuit Court of Appeals, 2d C. on April 9, 1901, but not yet officially reported,) the trade-mark rights of the complainant in labels applied to the goods in France and under which they were sold in this country, is sustained.

Trade-marks being creatures of common law and not of statute, the rights of aliens establishiag trade-marks by doing business thereunder in this country are the same as those of citizens. It does not matter by whom or where the goods are made, or by whom or where the mark is applied, so long as they are sold under, and acquire reputation with, the trade-mark. Treaty provisions relate to wholly different conditions from the building up of a common-law right here.

In view of the illustrative decisions above cited, and the undisputed fact that Rahtjen affixed the name "Rahtjen's Composition" to the paint which he imported into this country as a distinguishing mark for the trade here, and required his agent, Gelien, to place it upon the market under that name, whereby he built up a common-law trade-mark for his principal, by his authority, the first proposition of petitioner's counsel, we submit, cannot be maintained, especially since in his argument he justifies it neither by principle nor precedent.

2. The second proposition of petitioner's counsel requires no discussion, for whatever may have been the respective personal rights of Rahtjen and his agents in this country, they all became merged by assignment and succession in this respondent, thereby quieting its title. If there was trade under the name (and that is beyond question), rights to its use arose. To whom these rights accrued during the agency period ceased to be more than a moot question when respondent succeeded to the rights of all.

3. It is difficult to treat seriously the contention of counsel that Rahtjen, owning factories both in Germany and in England for the manufacture of his paint, could not shift the production of a supply thereof for a particular country from one to the other factory, without forfeiture of his trade-mark rights in such country. We submit that, so long as there never was a time when he lost control of the manufacture of his paint

either in Germany or in England, and never a period when the paint supply for this country emanated from any but a single source, and that a factory owned by Rahtjen, he could not be said to have abandoned or lost his trade-mark rights. In the Hunyadi cases, forfeiture of the Hungarian trade-mark did not affect the American rights.

4. The asertion of the fourth proposition by petitioner's counsel is at variance with the second proposition relied upon, for, assuming for the purposes of the argument (as alleged in the second proposition), that Rahtjen's selling agents in the United States could not, and did not, acquire for themselves domestic trade-mark rights, the argument that the disclaimer of Suter, Hartmann & Co. in the English Patent Office constituted an abandonment by Rahtjen of his trade-mark rights in "Rahtjen's Composition," even in England alone, is without force. The trade-mark which these agents sought to protect by registration was a *fac-simile* of their autographic signature, which they added to Rahtjen's trade-mark. All that they said by disclaimer was that, acting for themselves, "We do not claim the exclusive use of the words, 'Rahtjen's Patent Composition,'" etc. If they could not create substantive trade-mark rights for themselves, they did not have the legal right to register a trade-mark on his behalf, much less to bind him by a disclaimer of his broad and fundamental right. On the other hand, if his agents in the United States did acquire exclusive rights here, they could not be prejudiced by the acts or admissions of an agent in another country dealing solely with the rights existing there.

5. The distinguished counsel inadvertently made one erroneous statement as to the facts of the case. We wish to call attention to this, not only because of its bearing upon the point under discussion by him, but also because of its relation to other questions in the case.

He said that the petitioner's predecessors imported their alleged Rahtjen's Composition, *marked with that name*, into, and sold it in, the United States during the period since 1883, and that this fact was not disputed. So far from this being either proved or admitted, it is disputed by the respondent, and is absolutely without foundation in the proofs.

Max Holzapfel, in testifying to the amount of shipments of Rahtjen's Composition of Holzapfel's manufacture into the United States, fails to state that even a single package of it bore the name "Rahtjen's Composition." He says merely that the shipments were of *Rahtjen's Composition, manufactured by Holzapfel & Co.* (Rec., p. 268, Q. 63; Rec., p. 280, following X-Q. 157), not that they were known, marked or dealt in by that name. Andresen is the only other witness on this point. No where in his deposition does he testify that any of the petitioner's so-called "Rahtjen's Composition" ever bore that name. On the contrary, in his answer to Q. 26, p. 217 of the record, he says:

> "Going back as far as 1891, I know of our Raht-
> "jen's Composition having been put up in cans,
> "*plainly marked and stenciled with* OUR TRADE-MARK
> "*and the firm's name and firm's style*" (italics ours). (This trade-mark was the symbol of a red propeller).

This specific, carefully considered statement of the petitioner's custom in marking the cans is very significant. It indicates—and the inference may very properly be drawn therefrom—that the petitioner marked its goods with *its* trade-mark (red propeller, Pet. Brief, p. 29 near bottom), and not with "Rahtjen's Composition," and then sold the paint *surreptitiously as and for the genuine "Rahtjen's Composition."* The singular and unusual conduct of this witness in refusing to answer proper questions in cross-examination, which sought to disclose the truth or falsity of his

statements as well as those of Max Holzapfel, can be reasonably explained only on one of two grounds: Either the amount of business in Rahtjen's Composition done by the petitioner in the United States was vastly less than the amount stated by Holzapfel, and of much less value than as stated generally by himself, or the petitioner's own books would have disclosed that it had not been conducting its business in open competition with the respondent as claimed, but in a stealthy and underhand manner, characterized by the absence of respondent's trade-mark from such goods as might come to the view, either of the public or respondent. If such were the fact, it would further explain why knowledge of the petitioner's infringement during all these years did not come to the respondent or any of its officers.

The learned counsel, in the heat of discussion, fails to observe that the arguments he employs, even if valid, and his erroneous statement of fact, if true, render his own position untenable, without seriously affecting respondent's. If importation of foreign goods under a foreign mark into this country could not establish the exclusive right to that mark here, neither would a similar importation by the petitioner establish a hostile right either in the petitioner or the public. If Rahtjen's agents could acquire no trade-mark rights in this country either for him or for themselves, then the disclaimer of his agents in England could not work forfeiture or abandonment of his rights. The counsel's argument is a weapon which, while harmless to respondent, he has turned with fatal effect upon the petitioner.

New York City, April 29th, 1901.

Respectfully submitted,

TIMOTHY D. MERWIN,

THOMAS B. KERR,

Counsel for Respondent.

No. 54.

Petition for rehearing.

NOV 30 1901

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 54.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

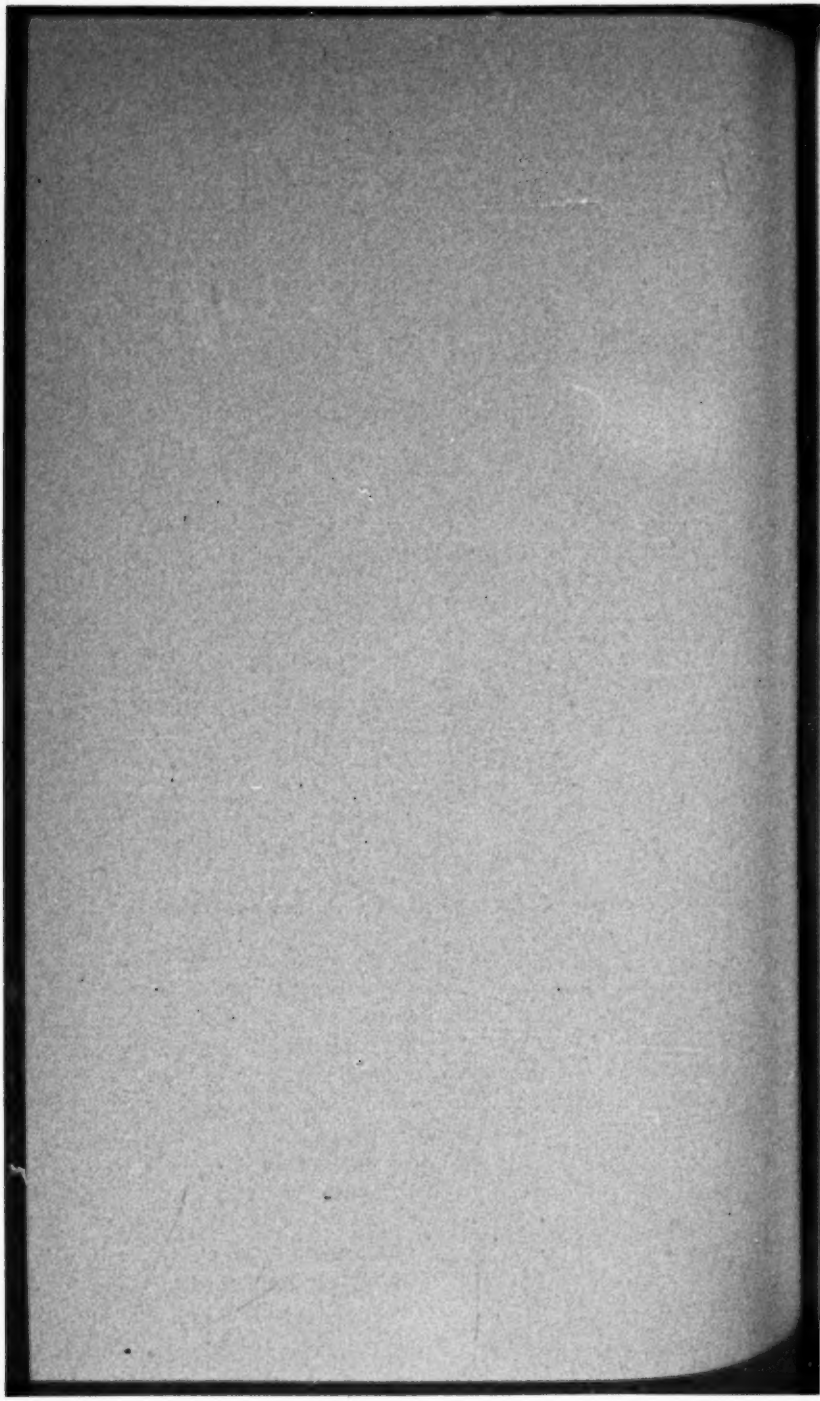
vs.

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

Respondent's Petition for Rehearing

TIMOTHY D. MERWIN,
THOMAS B. KERR,
Counsel for Respondent.

C. G. Burgoyne, Walker and Centre Streets, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 54.

HOLZAPFEL'S COMPOSITIONS COMPANY, LIMITED,
Petitioner,

AGAINST

RAHTJEN'S AMERICAN COMPOSITION COMPANY,
Respondent.

On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

Respondent's Petition for a Rehearing.

Now comes the respondent and respectfully prays the Court to restore the above-entitled cause to the docket and to order a reargument thereof, for the reason that the opinion of the Court recently handed down therein is based upon material mistakes of fact, which are set forth in the accompanying memorandum.

Respectfully submitted,
RAHTJEN'S AMERICAN COMPOSITION CO.,
By TIMOTHY D. MERWIN
and
THOMAS B. KERR,
Its Counsel.

Memorandum.

In support of the petition the following mistakes of fact in the Court's opinion, are specifically noted. (Italics ours throughout.)

I. That the paint shipped by Rahtjen from Germany into the United States (particularly from 1870 to 1873 inclusive) was *labeled "Rahtjen's Patent Composition."*

II. That the paint shipped from England to the United States (particularly from 1879 to 1883, inclusive) was *marked "Rahtjen's Patent Composition."*

III. That Suter, Hartmann & Co.'s agency for the sale of the paint in England was *not established till 1873.*

IV. That Hartmann Bros., or Suter, Hartmann & Co., *manufactured the paint for themselves from 1870.*

V. That the trade-mark of the *open hand*, together with the words *"Rahtjen's Patent Composition,"* was registered in England, in 1883, by *Suter, Hartmann & Co.*, accompanied by a *disclaimer* of the words "Rahtjen's Composition."

VI. That the *domestic trade-mark, "Rahtjen's Composition," was not used until after that name had been used* in this country *by the Holzapfel Co.*

I.

The Court is mistaken in finding that the paint shipped by Rahtjen into the United States (particularly from 1870 to 1873, inclusive) was labeled "Rahtjen's Patent Composition."

> The exact language of the Court is as follows: (Op., p. 2): "Up to the time of the above assignment (January 15, 1878) the Rahtjens had consigned their paint to New York in barrels or casks addressed to Gelien, and with *labels affixed thereon*, in which the article was described as '*Rahtjen's Patent Composition.*'"
>
> (P. 5:) "It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germany by Rahtjen, and sent to the United States in casks or packages marked '*Rahtjens Patent Composition Paint.*'"
>
> (P. 6:) "In 1873 an English Patent had been obtained, and from that time to 1878, when the Rahtjens assigned the exclusive right of sale in the United States to Suter, Hartman & Co., the words '*Rahtjen's Patent Composition*' were used on casks containing the paint sent by the Rahtjens to the United States."

If by "labels" the Court means paper labels, such as are referred to as "labels" in the record, the first statement quoted above is erroneous, because there is no evidence to that effect. The method of marking was with stencils, not labels.

All evidence in the record on this point is confined to the depositions of the witnesses, John Rahtjen, Heinrich Rahtjen and Henry Gelien, and the exhibits produced by them and placed in evidence.

There is nothing in the testimony and exhibits of these witnesses which supports the impression of the Court. On the other hand, the evidence establishes the exact opposite.

The critical or vital part of the period named is that from 1869 until the last of the year 1873, at which latter time John Rahtjen went from Germany to England, and application was made for the English Patent. During those years John Rahtjen personally stenciled most of the packages of paint shipped to Gelien, the sole agent in the United States. The correct version of the facts is given in the following quotations from the record (Testimony John Rahtjen, Rec., p. 104):

"Q. 51. Did you attend to or have knowledge of the shipment of Rahtjen's compositions during these years to Mr. Gelien? A. Yes.

"Q. 52. In what kind of packages were the composition usually shipped to him? A. Either in barrels or casks of about 2 cwt.

"Q. 53. Were there any *distinguishing marks* to show what the contents of these barrels or casks were, placed upon the barrels when shipped to him; and, if so, what marks or names were applied? A. The marks were 'H. G.' and the numbers on one side, and on the other side the contents, whether No. 1 or 2, and around these 1 or 2 '*Rahtjen's Composition.*'

"Q. 54. How was the name 'Rahtjen's Composition' placed upon the barrels or casks? A. So far as I remember *they were stenciled.*

"Q. 55. Was this name applied to these casks during this term of years in the shipments made to Mr. Gelien as the *distinguishing mark of the contents?* A. *Yes; they were.*

"Q. 56. *Do you know this of your own knowledge?* A. *Yes, I have marked nearly all the casks myself,* with the assistance of my brother.

"Q. 57. With the name '*Rahtjen's Composition*'? A. *Yes.*"

In cross-examination, the witness reiterates the foregoing statement, as follows, at page 111:

"x-Q. 128. You say, as I understand you, that you marked the barrels and casks containing the 'Rahtjen Composition' for shipment in the year 1871 and thereafter to the middle of 1879. That is correct, is it not? A. Yes, I have said that. I have marked them not alone, but with the assistance of my brother. When I left for England my brother took the marking.

"x-Q. 129. When did you leave for England? A. 1873.

"x-Q. 130. From 1871 up to 1873 *you attended to the marking or stenciling of the barrels and casks containing the composition?* A. *Yes.*"

It elsewhere appears that John Rahtjen left Germany for England at the end of 1873 (see his answer to Q. 380, on p. 140, of the record).

The facts stated by this witness are strictly in accord with, and following out, one of the essential conditions of the exclusive agency conferred upon Gelien, as set forth in the letter of Rahtjen to Gelien in November, 1869 (see Ex. Q., Rec., pp. 189, 190), as follows:

"In order to introduce my composition paint there, I quote you the following terms:

"(1) *The paint shall be brought on the market under the name of 'Rahtjen's Composition'.*"

This requirement of Rahtjen is specially significant in view of the preceding statement in the letter to the effect that he *did not intend to apply for a patent* upon the paint in the United States, but sought to introduce it there *without a patent. This shows that the question*

of patenting had been fully considered, and that the omission in the shipments to the United States of the word "Patent" in connection with the name, which it appears Rahtjen had been using in Germany, and subsequently used in shipments to England, where a patent was applied for, *was intentional.*

There can be *no doubt* that during the entire period of Gelien's agency from 1870 to 1878, inclusive, the paint shipped to the United States *was marked "Rahtjen's Composition," without the word "Patent,"* and that Gelien advertised and sold it under that name and *without the word "Patent"* (see Gelien's show card, Ex. R., Rec., opp. p. 208; Ex. U, Gelien's letter-head, both reproduced in the appendix to respondent's main brief; Ex. QQ, Gelien's invoice book, reproduced as a supplement to the record).

Further, John Rahtjen testifies that the terms of the letter of November, 1869, were complied with by Gelien (Rec., p. 102):

> "Q. 37. State whether or not the conditions and terms of the agency under which Mr. Gelien acted thereafter were in harmony with the terms of this letter. A. They were."

Gelien confirms this (Rec., p. 167):

> "Q. 21. State whether or not the terms of your agency for Mr. John Rathjen during the years mentioned were in substantial accordance with the letter of November [13], 1869? A. Yes, sir; that was the start of the correspondence in regard to the agency."

That Gelien bought and sold the paint as "Rahtjen's Composition" is evident from his testimony (Rec., p. 165):

> "Q. 3. Were you, during those years, the agent for any kind of composition for ships' bottoms?

A. Yes, I was agent, besides my business with Brickenstein. I carried on special business for selling composition paint.

"Q. 4. *What was the name of the composition paint which you sold?* A. *It was 'Rahtjen's Composition'* paint."

See, also, testimony of John Rahtjen in respect to an order from Gelien for paint (Rec., p. 117):

"x-Q. 194. Do the words 'Rahtjen's Composition' or the word 'Rahtjen' appear anywhere in the written context of that letter? A. They do not appear, *but the heading of the letter says to what it refers.* I may add that Gelien *received nothing but 'Rahtjen's Composition'* from me.

"x-Q. 195. Have you any written orders from Gelien for your composition in which the word 'Rahtjen' appears? A. It is never found necessary to write that. It was a matter of fact that *whenever Gelien ordered paint it was 'Rahtjen's Composition.'*

(P. 118:) "x-Q. 207. You do not know of your own knowledge under what name he sold it or invoiced it to his customers? A. *He was bound to use the name 'Rahtjen's Composition.'* Whether he has done so in every instance I cannot trace, but I believe he has, because the name of 'Rahtjen's Composition' was the name under which the paint was readily sold."

Gelien was Rahtjen's sole representative and exclusive agent in the United States, acting under specific requirements as to the name under which the paint must be sold (Ex. Q., Rec., pp. 189, 190; also, J. Rahtjen's Answer to Q. 65, p. 105):

"Q. 65. State whether or not Mr. Gelien, during the years 1870 to 1877, inclusive, was the *sole and exclusive agent* and seller of your 'Rahtjen's Compositions' in the United States? A. *He was.*

"Q. 66. Was *any other party* than Mr. Gelien authorized by you to use the trade-mark or trade-name of 'Rahtjen's Compositions' in the United States during those years? A. *Nobody was authorized* to use my name or the mark of '*Rahtjen's Composition*' *except Gelien.*"

In this respect Gelien occupied exactly the same position to Rahtjen that Donald subsequently did to the Holzapfel Company, and Gelien's acts were as much the acts of his principal in establishing the trade-mark as the later acts of Donald were of his principal in establishing that company's alleged use of the name prior to the domestic trade-mark. The sales to the trade were only by or through the agent in each instance. This seems to have been overlooked by the Court in its allusion to Gelien (Opinion, p. 1):

"They [Rahtjens] shipped some of the paint manufactured by them in Germany to the United States in 1870, consigned to Henry Gelien. They did not put it upon the market by sending generally to those who might wish to use it, but all their consignments from 1870 to 1878 were made to Gelien. Under what marks he sold the article does not appear."

There is nothing in the record inconsistent with the evidence cited, except an answer of Heinrich Rahtjen, on page 155, as follows :

"Q. 7. How were the barrels or casks of Rahtjen's Compositions marked that were sent to Gelien and Hartmann, LeDoux and Maecker by you? A. Those to Gelien, on the one side with 'H. G.' and the number and 'Hoboken,' and on the other side 'Rahtjen's Composition,' or Rahtjen's Patent Composition'; and those to Hartmann, LeDoux and Maecker on one side 'H.,LeD.

& M., New York,' and on the other side 'Rahtjen's Composition' or 'Rahtjen's Patent Composition.'"

This general statement of one attempting to recall events nearly thirty years old, in which another was the active participant, does not controvert the positive testimony of John Rahtjen, above quoted, who was the real manager of the business and among whose duties were the actual marking and shipping of the paint.

There is nothing in this entire record that can furnish the basis of the assumption or conclusion that the Rahtjens were guilty of false statements or representations in the marking of the paint sent to the United States.

As to the paint put upon the German market, the use of the word "Patent" was not deceptive, since it was in accordance with a German custom explicitly recognized by the German Court in the Hamburg case, the decision in which was put in evidence by the defendant-petitioner herein. The language of the Court in that case on this point is as follows (Rec., p. 369):

> "But, in the first place, an argument adduced in defense of the defendants, and especially in defense of the defendant Max Holzapfel, must be rejected as irrelevant. It is to the effect that the description '*Rahtjen's Patent Composition*' is to be considered as common property *because it has become a generally accepted description* of ships' bottom paint, prepared with alcohol instead of oil—*i. e.*, a generic term—or, in other words, *a name which by trade custom serves to designate ship-bottom paint, without being intended to ascribe any special source* (or, in particular, Rahtjen's works) *to such paint.* The two experts who have been heard have both declared that *this is not the case*, and that there existed many ship-bottom paints manufactured on the same or a similar

> principle which are not described as 'Rahtjen's Patent Paint' or 'Composition.' *As a generic term for such paints, the expression 'Patent Paints,' or 'Patent Compositions,' appears alone to have become usual, while the several manufacturers append their own names to this designation in order to show that what they offer is a patent paint produced by them as a specialty of their own* Thus, for example, we have Hoveling's patent paint, or Dr. Pflug's patent paint."

It would also seem that the language quoted was overlooked by this Court when it said (Op., p. 8):

> "The judgments in the Antwerp and Hamburg courts simply showed that in those countries the use of the words '*Rahtjen's Composition*' or '*Rahtjen's Patent Composition*' *had become descriptive of the article itself and did not in any way designate the persons who manufactured it.*"

Two conclusions are clearly found in the Hamburg decision—*i. e., that the described use of the word "Patent" was in Germany a recognized custom of trade and not a fraud, and that the name "Rahtjen's Composition" was not generic, but that the surname "Rahtjen" did indicate origin.*

Prior to 1874 all the paint for England was manufactured in Germany and shipped from there to England, marked as had been the custom in Germany, and with the evident purpose of applying for an English Patent as was later done. *On the other hand, in shipping to the United States, where Rahtjen had decided not to apply for a patent, that word was carefully and designedly omitted from the markings* and from the trade-mark.

The misapprehension of the Court is *material,* because upon it is based the ruling that *because of such alleged false representation Rahtjen acquired no trade-*

mark rights in the United States, and hence could transmit no such right to this respondent. It would seem to follow that *if there was no false representation Rahtjen did establish his trade-mark right, and could and did transmit it to respondent.*

II.

The Court mistakenly states that the paint in question which was shipped from England to the United States from 1879 to 1883 was marked "Rahtjen's Patent Composition."

The statement is as follows:

> (Op. p. 2:) "After the assignment to Suter, Hartmann & Co. of the exclusive right of sale in the United States and up to the year 1883, that firm sent the paint to the United States under the description of '*Rahtjen's Patent Camposition*'";
> and
> (P. 7:) "This rule held good when, at the expiration of the patent in November, 1880, Suter, Hartmann & Co., continued to send the paint to the United States as '*Rahtjen's Patent Composition*, Hartmann's Manufacture.' * * * After Suter, Hartmann & Co. obtained the trade-mark of an open hand, originally painted red, together with the name '*Rahtjen's Patent Composition*,' which was some time in 1883, the paint was sent to the United States *under that designation.*"

The evidence does not show that the packages of the paint when shipped from England to the United States

bore the mark "Rahtjen's Patent Composition," but the exact contrary, fully sustaining our contention that the word "Patent" was never used in marking the paint shipped to the United States.

The best evidence of what these markings really were from 1879 to 1884 is *the fac-similes of the actual stencils used.* These appear in evidence as Complainant's Exhibit KK, printed on page 198 of the record, and reproduced in the appendix to respondent's main brief. This exhibit was produced by the witness, William Hartmann, who testified about it as follows:

> (Rec., p. 87): "Re-d. Q. 323. State also whether, in such examination, you have come upon any stencils, or copies of stencils, used by the firm of Hartmann Brothers before the organization of your corporation, and, if so, will you produce the same? A. I have. I hereby produce them.
>
> "Re-d. Q. 324. Please explain what the separate papers are. A. The *first two are photographs of stencils that were in the possession of Hartmann Brothers before the red hand was registered.* The other photos are reproductions of stencils showing the red-hand trade-mark, and the next are stencils of the same." * * *
>
> "Re-d. Q. 327. State whether or not they are correct representations of the stencils which were used as you state by Hartmann Brothers. A. *They are.*"

John Rahtjen testifies to turning over to Hartmann Brothers in 1880 the stencils which he had previously been using (p. 112):

> "x-Q. 145. What became of those stencils when you ceased to use them? A. They became the property of Hartmann Brothers, my successors."
>
> (P. 132:) "x-Q. 315. These stencils were then turned over to Hartmann Bros. some time in 1880? A. In 1880.

" x-Q. 316. Were they transferred to Hartmann Bros. for the *purpose of their continuing the use of such stencils* and for the *purpose of continuity in the markings?* A. *Yes, they were,* but I do not know whether they used them as they got them, because they made some additions to it.

" x-Q 317. Did the stencils which you turned over to Hartmann Bros. contain the word 'Rahtjen' or the words 'Rahtjen's Composition?' A. '*Rahtjen's Composition.*'

" x-Q. 318. *Are you positive about that—that these stencils did contain the words 'Rahtjen's Composition'?* A. *Yes.*"

(P. 133 :) " x-Q. 330. Is it not possible that the stencils, or markings, on the barrels or casks, as put on by you and afterwards by Hartmann Bros., did not contain the words 'Rahtjen's Composition'? A. *I had extra stencils made for that purpose—'Rahtjen's Composition';* other stencils with 1, 2 and 3; other stencils with destination, and, besides that, the numbers of the casks and 'S., H. & Co.,' and what else was wanted."

" x-Q. 335. As you transferred these stencils to Hartmann Bros. in 1880, or 19 years ago, and used them prior to that time, it is requiring you to carry back your memory over a long time, and is it not possible that you may be mistaken as to the words 'Rahtjen's Composition' appearing on the markings of the barrels or casks themselves? A. *I made no other stuff than 'Rahtjen's Composition,'* and there was no necessity for me to mark them differently.

" x-Q. 336. You have said in your cross-examination that your memory for facts and events is not very reliable. In view of that statement, and in view of the long period of time over which you are required to carry back your memory, is it not possible that you may be mistaken regarding the words 'Rahtjen's Composition' appearing in the

markings themselves on the casks or barrels? A. *I have always taken care that 'Rahtjen's Composition, should appear on every cask;* but as no man is infallible, some of the casks may not have been marked. Of course, for a certainty, I could not say that every keg or cask did bear the words 'Rahtjen's Composition.' *Instructions were given that it should be stenciled on.*"

(P. 137:) "Q. 362. Do you know whether Hartmann Brothers marked the drums or barrels of Rahtjen's compositions with the words 'Rahtjen's Composition,' after they succeeded to your business? A. After I left England, Hartmann Brothers had some difficulty now and then in making the composition, and I had to come to London to assist them. When at the works I had some drums taken before me and had [them] opened *them* to examine the contents. *I then saw that the drums were marked 'Rahtjen's Composition,'* so far as I remember.

"Q. 363. How frequently did you visit their place of business after they had succeeded you? A. I was in London the second year, I think, three times. The third year I do not remember. They managed to get on by themselves.

"Q. 364. You then visited their place of business several times after you had transferred the business to them? A. I did.

"Q. 365. And you, therefore, had opportunity at such visits to see the drums which they were using and the marks upon them? A. *Yes; so far as I remember, they were all marked 'Rahtjen's Composition.'*

(P. 140:) "Q. 386. I read to you from your redirect examination: 'Q. 365. And you, therefore, had opportunity at such visits to see the drums which they were using and the marks upon them? A. Yes; so far as I remember, they were all marked "Rahtjen's Composition."' This question

and answer is in connection with the markings which you state you saw upon the drums of Rahtjen's Composition manufactured by your successor, Hartmann Bros. Are you certain that you saw the mark 'Rahtjen's Composition' upon their packages? A. *Yes; I am certain.*"

(P. 149:) "x-Q. 478. And how were the drums which you had opened at that time marked? Describe the markings on the drums. A. *What I remember was 'Rahtjen's Composition'* on them, and the No. 1, 2 or 3."

(P. 150:) "x-Q. 493. Is it not a fact that in testifying with regard to the markings on those drums, you are testifying more in regard to your recollection of the general course of markings rather than to any picture of those drums that you have now before your eye? A. *I saw that those packages which were opened for my inspection bore the mark 'Rahtjen's Composition' on them*—1, 2 or 3.

"x-Q. 494. But you do not remember whether it was 1, 2 or 3? A. I do not remember.

"x-Q. 495. And all you do remember are the words 'Rahtjen's Composition'? A. '*Rahtjen's Composition*' *was on them*, and the figure to show the contents."

August Hartmann, one of the firm of Hartmann Brothers, and who was familiar with the factory business of the firm, testified on this point as follows (Rec., p. 155):

"Q. 5. Do you know how the barrels, casks and drums of Rahtjen's composition as manufactured by your firm were generally marked? A. Yes, I have a good recollection of it.

"Q. 6. I show you 'Complainant's Exhibit KK.' Referring to the second photograph, please state how many different stencils were used to

make up that one photograph? A. Eight different stencils shown on that photo, taking the number '150' as one stencil.

"Q. 7. Please give the matter which was on each stencil? A. '*Rahtjen's anti-fouling composition*,' first; 'Remove head and stir well before using,' second; 'III.' in the centre, third; 'S. H. & Co.,' fourth; '150,' fifth; 'Trieste,' sixth; 'III.,' seventh; 'Stir well before using,' eighth.

* * * * * *

"Q. 11. How were the packages containing Rahtjen's composition manufactured by Hartmann Brothers, which were shipped to agents in the United States, marked, distinguishing the marks before the (ho)use of the red hand brand from these used afterwards? A. *I should say they were marked according to these stencils.*

"Q. 12. Were the stencils shown in photographs 1 and 2 of this exhibit used upon packages of Rahtjen's composition of your firm's manufacture *which were sent to the United States before 1883?* A. *Yes, to the best of my recollection, they were.*

* * * * *

(P. 157:) "x-Q. 23. I will ask you the same question that I asked your brother in reference to the upper half of the first photograph—namely, whether it is not probable that, in grouping the several stencils going to the form of marking on this other half, the stencil containing the word 'priming' has not been used inadvertently instead of, say, the 'No. 3'? A. *No, I am quite clear on this point; my recollection is that 'Rahtjen's anti-fouling composition' formed the general designation for composition,* and was called so by us in all our circulars, and this stencil was put on all casks and kegs, with only this difference: that, where it was priming, the head of the cask would

be white, and 'priming' would be stenciled in the centre."

(P. 158:) "x-Q. 27. And is it not a fact that the three bars or numerals and the words 'Stir well before using' constituted the markings on the other end of the cask or barrel as you marked them? A. No, I should not say so. I should say that this 'III, stir well before using,' would be used in place of the 'III' above, and 'Remove head and stir well before using' *in connection with 'Rahtjen's anti-fouling composition.'*

* * * * *

"Re-d. Q. 30. What, if anything, would ordinarily be used in addition to the markings on the bottom of the second photograph when placed upon a barrel head as shown in the upper left-hand corner of Defendant's Exhibit Photograph? A. *I should say the stencil mark, 'Rahtjen's anti-fouling composition'* (pointing to that at the top of the photograph).

"Re-d. Q. 31. Referring to the picture of a barrel head at the lower 'eft-hand corner of the Defendant's Exhibit Photograph, what would ordinarily, and in the usual course of business, be placed upon the barrel head in addition to the words 'Priming, stir well before using,' if anything? A. *I repeat the same answer—'Rahtjen's anti-fouling composition'—which was the usual designation.*"

By reference to the stencils—Ex. K. K.—it will be seen that they *no where contain the word "patent,"* but that the first two which were used prior to 1883 in marking the the shipments to the United States, contain the words "*Rahtjen's anti-fouling composition,*" and the stencils Nos. 3–7, and 9, which were used for like purpose after 1883 to the date of suit, contain the words "*Genuine Rahtjen's Composition.*" *There is*

absolutely no evidence of the use on these shipments of any other stencils, labels or other marking devices, and the only reasonable conclusion is that the shipments to the United States were marked "Rahtjen's Composition" and not "Rahtjen's Patent Composition."

The mistake of the Court in finding as it did is material, because upon it is based in part its ruling that the trade-mark "*Rahtjen's Composition*" *was not used* in the United States *prior to its use by Holzapfel*, and hence that it could not be transmitted to this respondent. It is apparent from the evidence cited that this finding and ruling was made under a misapprenension.

III.

The Court erroneously finds that Suter, Hartmann & Co.'s agency for the sale of Rahtjen's composition in England, did not begin till 1873.

The statement is:

> (Op., p. 3). "*In 1873* they (Rahtjens) entered into negotiations with Suter, Hartmann & Co. in England for the sale of their paint in that country."

On the contrary, these negotiations took place in *1870*, and the agency commenced in *January, 1871*, and continued uninterruptedly till long after 1873, in fact, until 1888 (see Dep. W. Hartmann Rec., p. 53).

> "Q. 2. State whether or not you were ever connected with the firm of Suter, Hartmann & Co.?
> A. Yes, I was.

Q. 3. In what capacity and for how long ?

A. I was the founder of the firm of Suter, Hartmann & Co. *in the beginning of the year 1871* up to the time of the formation of the company, Suter, Hartmann & Rahtjen's Composition Company, Limited, constituted in the year 1888.

" Q. 4. Were you then a partner in the firm of Suter, Hartmann & Company during that entire period ?

" A. Yes.

" Q. 5. What was the business of Suter, Hartmann & Co. ?

" A. *The sole consignees of Rahtjen's Composition.*

" Q. 6. Sole consignees of what consignor ?

" A. Of John Rahtjen, Bremerhaven."

* * * * *

(P. 68:) " x-Q. 140. When did James Suter & Company first begin the sale of Rahtjen's composition ?

" A. James Suter & Company was in existence *when we applied to Rahtjen for the sole sale of the paint. As soon as we arrived with Mr. Rahtjen at an understanding, the firm Suter, Hartmann & Company was constituted a few months after, in January, 1871.*"

It is, therefore, clear that these agency negotiations took place *before 1871*, and the agency commenced as early as *January, 1871.*

This mistake is material, because on it is based the *assumption that there was no use of the name " Rahtjen's Composition " in England prior to the date of the English Patent, and hence that the name was first applied to a patented article.*

IV.

The Court also erroneously finds that Hartmann Bros., or Suter, Hartmann & Co., manufactured the paint for themselves from 1870.

This finding is as follows:

> (Op., p. 2:) "*After 1870* the firm of Hartmann Brothers, or Suter, Hartmann & Co., *manufactured* the composition for *themselves* in England *by the license of the Rahtjens, and for a time after 1874 Rahtjen also manufactured* in England as well as Germany."

This statement has no support in the record, and is an evident misapprehension, because it appears that *Suter, Hartmann & Co., were selling agents* only, and *never manufactured the paint. Hartmann Bros., the manufacturers, had no connection with the business until 1880,* when they acquired the Rahtjen factory in England, and the exclusive right to manufacture the paint and to use the trade-mark in England.

> (Rec. p. 107): "Q. 83. Down to what time did you continue to manufacture 'Rahtjen's Compositions' in England yourself?
>
> "A. Up to 1878 in Liverpool, and then from 1878 to 1880 in London.
>
> "Q. 84. Who were your consignees or agents in England during that period, and state whether or not they were exclusive agents for Great Britain?
>
> "A. Suter, Hartmann & Co. were the exclusive agents.
>
> "Q. 85. Who succeeded you in the manufacture of 'Rahtjen's Compositions' in England?
>
> "A. Hartmann Brothers. * * *

"Q. 90. For how long a time, if you know, did Hartmann Brothers carry on the manufacture in in England of 'Rahtjen's Compositions?'

"A. From 1880 until the present company of Suter, Hartmann & 'Rahtjen's Composition' Co., Ltd. was founded."

See, also, Extracts from Ex. H H, Rec., pp. 207 and 208.

The manufacturing of the paint prior to 1880 was carried on exclusively by Rahtjen, beginning in Germany in 1865, shipments being made into England from Germany consigned to his exclusive agents, Suter, Hartmann & Co., until 1874, when Rahtjen established a factory in England for the trade there.

This mistake of the Court also is material, because, if such had been the fact, the manufacture of the paint by other parties beside Rahtjen, and with his consent, would have supported the conclusion of the Court that the name "*Rahtjen's Composition*" *had been by Rahtjen dedicated to the public and had become a mere descriptive term, indicating the thing, but not its ownership or origin.* The evidence shows the contrary to be the fact, as above stated, and that the *name never lost its significance as denoting origin.*

V.

The Court further errs in finding that the trade-mark of the symbol of the open hand was registered in 1883 in England by Suter, Hartmann & Co., together with the words "Rahtjen's Patent Composition," and that this registration was secured only by

their disclaimer of the words "Rahtjen's Composition."

The Court says (Op., p. 6):

> "From that time [1880] until 1883, when the trade-mark was obtained by Suter, Hartmann & Co." * * * (P. 7:) "After Suter, Hartmann & Co. obtained the trade-mark of an open hand, originally painted red, *together with the name 'Rahtjen's Patent Composition,'* which was some time in 1883, the paint was sent to the United States under that designation, *but the trade-mark was not obtained without the positive disclaimer* by the plaintiffs of the right of exclusive use of the words 'Rahtjen's Composition,' and, unless they disclaimed that exclusive right, they could have obtained no trade-mark."

This error is apparent from the preceding pages of the opinion (pp. 3 and 4), which show that the Court has confused two different registrations: viz., that of the symbol of the open hand by *Hartmann Bros.—not Suter, Hartmann & Co.—on April 25, 1883*, in connection with which *neither the words "Rahtjen" nor "Patent" appears, nor was there any disclaimer*, and that by *Suter, Hartmann & Co., of the fac simile of their autographic signature on January 9, 1884*, in connection with which the disclaimer was filed, as appears by the original exhibit, the print in the Record (pp. 406-409) not being an exact reproduction. It is also evident that the Court has confused the commercial firm of Suter, Hartmann & Co. with the manufacturing firm of Hartmann Bros. At the time of the disclaimer the right to the name Rahtjen's Composition in England was in *Hartmann Bros.* by virtue of their license contract with Rahtjen (see Ex. H. H., Rec., pp. 207 and 208), and *not in Suter, Hartmann & Co.*, and hence the disclaimer by the latter was *proper*, and in *no way affected*

the rights of Hartmann Bros., but rather was a recognition of their rights as far as it had significance.

The Court's error on this point is material, because the formal disclaimer of subject matter which belonged to another firm could not be presumed to limit the latter's rights, especially in the United States where for years prior to the disclaimer the trade-mark had been established and used, and was later registered, by the representatives of Hartmann Bros., the trade-mark being immediately assigned to Hartmann Bros. (see Ex. N. N., p. 202). *Rahtjen never parted with the trade-mark "Rahtjen's Composition" until 1880*, when he transferred it to his licensees, Hartmann Bros., who caused the mark to be registered for them in the United States.

VI.

The Court also errs in finding that the domestic trade-mark "Rahtjen's Composition" was not used until after the Holzapfel Company began to use the name on its own paint.

The Court says :

> (Op., p. 7.:) "The registration of the trade-mark of Hartmann, LeDoux & Maecker in the United States in June, 1885, was not only subsequent to the expiration of the English patent, but also *subsequent to the time when the defendant company had commenced to manufacture the paint as 'Rahtjen's Composition*, Holzapfel's Manufacture,' and *had sent the same to the United States under that description* at least as early as 1884.

The United States registered trade-mark could not, therefore, interfere with the *prior* (but not exclusive) *right of the defendant to the use of those words.*" And

(P. 9.:) The domestic trade-mark which the respondent also claims gives it that right *was not used until after the sale of the composition by the petitioner in the United States under the name of 'Rahtjen's Composition,* Holzapfel's Manufacture.' "

These statements are not supported by the evidence. The trade-mark certificate (Complainant's Exhibit, Record, p. 210) contains the following words, viz.:

" This trade-mark has been used continuously in business by us and those from whom we derived our title, since 1878 " ;

this being the date when the registrants' agency commenced.

This is *prima facie* proof of the fact of the use of the trade-mark from 1878 to the date of the registration. It appears, further, that the registrants as agents for Rahtjen and later for Hartmann Bros. did a continuous and increasing business in Rahtjen's Composition from the beginning of their agency in 1878 (see Dep. J. Rahtjen, Rec., p. 105–6).

" Q. 67. You have stated that the agency of Mr. Gelien was terminated in the year 1877. Did you appoint or have any other agent or agents succeeding him ? If so, who were they ?

" A. They were Hartmann, Le Doux & Maecker of New York.

" Q. 68. State whether or not they were appointed and acted as your sole and exclusive agents.

" A. They were.

"Q. 69. When did that firm's agency commence?
"A. In 1878."

* * * * * *

"Q. 80. State if you know the amount of 'Rahtjen's Composition' which you furnished to the firm of Hartmann, Le Doux & Maecker from Bremerhaven during the year 1878 and the first half of the year 1879.
"A. In 1878, 196 cwt. were sent, and, during 1879, 154 cwt. were sent."

It appears from Exhibit P (Record, pp. 185–189) that the business increased from year to year, until 1891.

The use of the domestic trade-mark by the registrants for its owners, the manufacturers Rahtjen and his licensees Hartmann Bros. from 1878, is thus conclusively proven.

This last specified mistake of fact is material, because upon it is distinctly based the ruling that:

"The United States registered trade-mark could not, therefore, interfere with the prior (but not exclusive) right of the defendant to the use of those words" (Op., p. 7).

Conclusion.

In conclusion, it is respectfully submitted that, in view of the evidence thus called to the attention of the Court *by exact quotation*, the questions at issue should be re-examined and a rehearing granted, in order that the evidence may be discussed. In this way it will be developed whether error has been made in the decision

of the Court, and if such be found to be the case it can be rectified.

We desire also to note that none of the facts which we have cited from the record have been contradicted, or even questioned, on behalf of the petitioner, either by evidence or in argument. The finding of fact by the Circuit Court of Appeals, which fully sustains our contention and which sets forth nearly every fact above noted by us, is not questioned in a single particular either by the dissenting member of that Court or by counsel for petitioner in their brief and argument here. The Judges of the Circuit Court of Appeals, while in substantial accord as to the facts, have disagreed as to the legal effect of the same. The finding of fact by this Court disagrees, in the important particulars pointed out in the six heads of the preceding memorandum, with the finding of the Court of Appeals, and we submit that this is an additional reason why the evidence should be re-examined and counsel again heard upon the same.

New York City, November 26, 1901.

Respectfully submitted,

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THOMAS B. KERR,

Counsel for Respondent.

Supreme Court of the United States.

No. 54.—October Term, 1901.

The Holzapfel's Compositions Company, Limited, Petitioner, *vs.* The Rahtjen's American Composition Company, Respondent.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[October 21, 1901.]

The respondent, a New York corporation, commenced this suit in equity in the Circuit Court for the Southern District of New York, against the petitioner, which is a foreign corporation organized under the laws of the Kingdom of Great Britain and having a place of business in the city of New York, to restrain it from the use of the trade-mark which the respondent averred it had acquired in the name "Rahtjen's Composition," and to obtain an accounting of the profits and income which the petitioner had unlawfully derived from the use of such trade-mark, and which it had by reason thereof diverted from the respondent. Issue was taken on the various allegations in the bill, and upon the trial the Circuit Court dismissed the same, (97 Fed. Rep. 949,) but upon appeal to the Circuit Court of Appeals the decree of the Circuit Court was reversed and the case remanded to that court with instructions to enter a decree enjoining the petitioner from selling or offering to sell Rahtjen's Composition under that name, and from using the name upon its packages or in its advertisements. (101 Fed. Rep. 257; 41 C. C. A. 329.)

Judge Wallace dissented from the judgment and opinion of the Circuit Court of Appeals, holding that the case was properly decided in the court below, and that the decree ought to be affirmed.

The defendant and petitioner then prayed this court for a writ of certiorari, which was granted, and the case thus brought here.

The trade-mark in regard to which this contest arises pertains to a certain kind of paint for the protection of ships' bottoms from rust and from vegetable or animal growth thereon, either in salt or fresh water. The paint was of three kinds, numbered, respectively, Nos. 1, 2 and 3. The evidence in the record shows that some time between the years 1860 and 1865, one John Rahtjen invented in Germany a particular kind of paint for the purpose above mentioned. In connection with his sons he began in 1865 to manufacture the paint for general use, and it speedily acquired a high reputation among owners of shipping as valuable for the purposes intended. The elder Rahtjen never obtained a patent for the article in Germany, neither did he or his sons apply for or obtain one in the United States. They first shipped some of the paint manufactured by them in Germany to the United States in 1870, consigned to Henry Gelien. They did not put it upon the market by sending generally to those who might

wish to use it, but all their consignments from 1870 to 1878 were made to Gelien. Under what marks he sold the article does not appear.

On November 19, 1869, one of the firm wrote to Mr. Gelien from Bremerhaven, making him the sole agent of the firm for the sale of its paint in the United States, and informing him that they had not obtained a patent for their composition in America nor applied for one in the United States, as there was no danger in introducing the composition in America, the invention not being of a nature facilitating good imitations. The father died in 1873, after which the sons continued the business.

Gelien was succeeded as the consignee of the paint in the United States, in 1878, by the firm of Hartmann, La Doux & Maecker, to whom for a short time the paint was consigned from Germany, and then it was sent them from England through Rahtjen's assigns there. The Hartmann firm was succeeded in July, 1886, by Emil Maecker, as agent for the sale of the paint in the United States, and on January 1, 1889, Maecker was succeeded by one Otto L. Petersen, and in 1891 Petersen was succeeded by the respondent corporation, and was made its president.

On January 15 1878, "Joh" Rahtjen assigned to "Messrs. Suter, Hartmann & Co., in London, the exclusive right of sale of my patent composition paint for the United States of North America, for the period of twelve years from the commencement of 1878 to the end of 1889." After 1870 the firm of Hartmann Brothers, or Suter, Hartmann & Co., manufactured the composition for themselves in England, by the license of the Rahtjens, and for a time after 1874 Rahtjen also manufactured in England as well as in Germany. During this time the composition when manufactured by Hartmann was marked "Rahtjen's Patent Composition, Hartmann's Manufacture." Up to the time of the above assignment the Rahtjens had consigned their paint to New York in barrels or casks addressed to Gelien, and with labels affixed thereon, in which the article was described as "Rahtjen's Patent Composition," and after Hartmann, La Doux & Maecker became agents, the casks were addressed to that firm at New York and labeled the same way.

While Gelien acted as consignee he prepared and issued a show card and also letter heads and circulars with "Rahtjen's Composition Paint, known as the German Paint," on the cards and on the heading of his letters and circulars, and also directly underneath was the picture of a vessel. The show cards and circulars were issued for the purpose of advertising the paint, and the show card was copyrighted by Gelien for himself.

After the assignment to Suter, Hartmann & Co. of the exclusive right of sale in the United States, and up to the year 1883, that firm sent the paints to the United States under the description of "Rahtjen's Patent Composition," and the Rahtjens themselves sent no more paint to the United States from Germany.

In 1873 they entered into negotiations with Suter, Hartmann & Co., in England, for the sale of their paint in that country, and on November 29, 1873, Heinrich Rahtjen obtained in England a patent for the paint for the term of fourteen years from the date thereof, provided, among other conditions, he should at the end of seven years pay a stamp duty of one hundred pounds, and in case he did not pay, the patent was to "cease, determine and become void." It remained in existence for seven years, or until November 29, 1880, and then ceased because of the failure to pay the one hundred pounds stamp duty as provided for in the patent.

The label used by Suter, Hartmann & Co. in sending the paint to their different agents and customers contained the words "Rahtjen's Patent Composition" and "None genuine without this signature, Suter, Hartmann & Co." These words were used by them from the outset of their career as consignees for the composition.

In May, 1883, two years and a half after the expiration of the English patent, the predecessors of the petitioner commenced in England to make and sell this paint, and in 1884 they sent it to the United States under the name of "Rahtjen's Composition, Holzapfel's Manufacture."

On June 25, 1883, John Rahtjen filed with the English office an application for registration as a trade-mark of the words "Genuine Rahtjen's Composition for Ships' Bottoms," &c. This application was opposed by Holzapfel & Co., through their solicitors, and no counter-statement having been filed by Rahtjen the application was deemed to be withdrawn.

On July 7, 1883, Rahtjen filed another application for registration of the words "Rahtjen Composition." This, too, was opposed, and the application thereafter held to be withdrawn.

On June 28, 1883, Suter, Hartmann & Co. filed an application for registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys &c. None genuine without this signature, Suter, Hartmann & Co." This application was opposed by defendant's predecessors, Holzapfel & Co., and was withdrawn.

On the 25th of April, 1883, Hartmann Brothers filed an application for a trade-mark in this form:

The application was granted, and from that time they had an exclusive right to use that mark. It is not charged that the defendant has ever in any way imitated or infringed upon it.

On January 9, 1884, Suter, Hartmann & Co. filed an application for the registration of the words "Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. Directions. Suter, Hartmann & Co." In their application for registration they said: "We do not claim the exclusive use of the words 'Rahtjen's Patent Composition for Ships' Bottoms, Buoys, &c. Directions,' or any of such words, except as part of the combination constituting our trade-mark, as represented annexed, and to which we claim exclusive right." This trade-mark was registered. The following is a copy:

RAHTJEN'S

PATENT COMPOSITION,

FOR SHIPS' BOTTOMS, BUOYS, &C.

Directions.

SUTER, HARTMANN & CO.

There has never been any infringement of it by defendant, but it has used the words "Rahtjen's Composition" in connection with the statement that it was manufactured by Holzapfel & Co., and it has so used them on goods sold in the United States, and did so at the time of the commencement of this suit.

Before the assignment to Suter, Hartmann & Co. of the exclusive right to sell the composition in the United States, Rahtjen had transferred to Hartmann Brothers in England the exclusive right to manufacture it there, and so in their manufacture it was described as "Rahtjen's Composition. Hartmann Brothers' Manufacture."

In 1888, Suter, Hartmann & Rahtjen's Composition Company (Limited) was formed, and Suter, Hartmann & Co. assigned their rights and interests in the paint and trade-mark to that company, and in 1891 the respondent company was formed and the English company transferred to it all rights to the trade-marks belonging to and used by the English company in America, and agreed not to carry on any business of a like character in the United States.

In 1899 complaint was made before the Court of Commerce, sitting at Antwerp, by Rahtjen and by Suter, Hartmann & Co. against defendant W. Wright, in which they complained of the defendant that he had put on the sign of his house the inscription "Manufacturers of Rahtjen's

Composition," and that in his prospectus and other publications he announced that he sells the "Original Rahtjen's Composition for Ships' Bottoms, manufactured by the London Oil and Colour Co., Limited." This use of the name of the complainant by the defendant, the court held, constituted an illegal act, and even if the complainants had not retained their right to the use of the words "Rahtjen's Composition," that the defendant had not acquired the right to use the name in such a way as to cause the public to believe that his product was the product of Rahtjen or of his delegates. The defendant was therefore condemned in judgment and enjoined from the use of the words in future. An appeal was taken from this decision and the court above reversed the judgment, holding that the name "Rahtjen's Composition" had become the property of the public, which had the right to "offer it for sale under the name generally used to describe it, because any other name would completely mislead the purchaser, always supposing that the public is not to be led astray as to the individuality of the manufacturer, or as to the source of the said products. As it is shown by the documents deposited in the present process that the varnish invented by the associate is generally known in England and in Belgium under the name of Rahtjen's Composition; so that in the eyes of the public this name of Rahtjen has become a sort of qualifying adjective indicative of this special product; as the appellant has always in his sign and in his circulars been careful to announce that the product that he sells was manufactured by the 'London Oil and Colour Company,'" the court held that the intention of bad faith which constitutes an element necessary to the establishment of breach of faith had no actual existence, and the judgment was therefore reversed.

Complaint had also been made by Mr. John Rahtjen in the court at Hamburg against Holzapfel and others for the wrongful use of the words "Rahtjen's Composition," and that court held in substance that there was no longer any exclusive property in the words used, and that the defendants should, therefore, be discharged.

Mr. Justice PECKHAM, after making the above statement of facts, delivered the opinion of the Court.

We are of opinion that no valid trade-mark was proved on the part of the Rahtjens, in connection with the paint sent by them from Germany to their agents in the United States prior to 1873, when they procured a patent in England for their composition. It appears from the record that from 1870 to 1879, or late in 1878, the paint was manufactured in Germann by Rahtjen and sent to the United States in casks or packages marked "Rahtjen's Patent Composition Paint."

Prior to November, 1873, the article was not patented anywhere, and a description of it as a patented article had no basis in fact, and was a false

statement tending to deceive a purchaser of the article. No right to a trade-mark which includes the word "patent," and which describes the article as "patented" can arise when there is and has been no patent, nor is the claim a valid one for the other words used where it is based upon their use in connection with that word. A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized, nor can any right to its exclusive use be maintained. (*Manhattan Medicine Company* v. *Ward*, 108 U. S. 218, 225; *Wrisley Co.* v. *Iowa Soap Co.*, 104 Fed. Rep. 548.)

In 1873 an English patent had been obtained, and from that time to 1878, when the Rahtjens assigned the exclusive right of sale in the United States to Suter, Hartmann & Co., the words "Rahtjen's Patent Composition" were used on casks containing the paint sent by the Rahtjens to the United States, and must have referred to the English patent, as there was no other, and the right to use those words depended upon the existence of the patent, although up to 1878 the article sent to the United States was manufactured in Germany. As the right to use the word depended upon the English patent, the right to so designate the composition fell with the expiration of that patent, and from that time (1880) until 1883, when the trade-mark was obtained by Suter, Hartmann & Co., there can be no claim made of an exclusive right to designate the composition as Rahtjen's composition, because from 1880 that right became public as a description of the article and not of the name of the manufacturer. During its whole existence the name had been given to the article, and that was the only name by which it was possible to describe it.

The labels used by Suter, Hartmann & Co., from the outset of their career as sole consignees, contained the description "Rahtjen's Patent Composition, None genuine without signature, Suter, Hartmann & Co." These labels were affixed to the packages, and were sent to Rahtjen in Germany when he manufactured for them, to be placed on packages, and when he subsequently made the composition in England the labels were sent to him there to be affixed. This way of designating the composition was employed by Rahtjen in Germany for his own sales, and Suter, Hartman & Co. simply copied his method of describing the same. How else could this article thereafter be described? When the right to make it become public, how else could it be sold than by the name used to describe it? And when a person having the right to make it described the composition by its name and said it was manufactured by him, and said it so plainly that no one seeing the label could fail to see that the package on which it was placed was Rahtjen's composition manufactured by Holzapfel & Co., or Holzapfel's Composition Company (Limited), how can it be held that there was any infringement of a trade-mark by employing the only terms possible to describe the article the manufacture of which was

open to all? Of necessity when the right to manufacture became public the right to use the only word descriptive of the article manufactured became public also.

This rule held good when at the expiration of the patent in November, 1880, Suter, Hartmann & Co. continued to send the paint to the United States as "Rahtjen's Patent Composition, Hartmann's Manufacture," because it is plain that the name of Rahtjen had, as we have said, become descriptive of the article itself, and was not a designation of the manufacturer. It had been manufactured both in Germany and in England at the same time, and that which was manufactured in England by Hartmann Brothers or Suter, Hartmann & Co. had been distinguished from the German article by the statement that it was "Rahtjen's Genuine Composition, Hartmann's Manufacture." If any one had desired to use this paint and had called for it in the market, he would necessarily have been compelled to describe it as "Rahtjen's Composition," as there was no other name for the article, and though in England while the patent lasted no one but the patentee or his licensees could manufacture the article, yet the description would still have been "Rahtjen's Composition;" but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words "Rahtjen's Composition." The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent. After Suter, Hartmann & Co. obtained the trade-mark of an open hand, originally painted red, together with the name "Rahtjen's Patent Composition," which was some time in 1883, the paint was sent to the United States under that designation; but the trade-mark was not obtained without the positive disclaimer by the plaintiffs of the right of exclusive use of the words "Rahtjen's Composition," and unless they disclaimed that exclusive right they could have obtained no trade-mark.

The registration of the trade-mark of Hartmann, La Doux & Maecker in the United States in June, 1885, was not only subsequent to the expiration of the English patent, but also subsequent to the time when the defendant company had commenced to manufacture the paint as "Rahtjen's Composition, Holzapfel's Manufacture," and had sent the same to the United States under that description, at least as early as 1884. The United States registered trade-mark could not, therefore, interfere with the prior (but not exclusive) right of the defendant to the use of those words.

The respondent company advertised and sold in the United States the composition under the name of "Rahtjen's Composition, Hartmann's Manufacture," while the petitioner advertised and sold its composition as

"Holzapfel's Rahtjen's," or "Holzapfel's Improved Rahtjen's Composition," or "Holzapfel's Improved American Rahtjen's;" so it is seen there is no room for the claim that the composition manufactured by the petitioner purports to be manufactured by Rahtjen or Hartmann. It is a clear cut description of the name of the article which it manufactures, and there is no pretense of deceit as to the person who in fact manufactures it.

The trade-marks which have been spoken of, and which were obtained in 1883 and 1884, do not cover the right to use the name "Rahtjen" exclusively. The trade-mark obtained in April, 1883, by Hartmann Brothers, described as the "red hand symbol," does not purport to contain any name, while that issued to Suter, Hartmann & Co., while it contained the name "Rahtjen's Patent Composition," was obtained only by the disclaimer on the part of the applicants of the right to the exclusive use of those words, except as part of the combination constituting the trade-mark. Prior to the English patent, the respondent's predecessors or assigns had no valid trade-mark in England for the same reason the Rahtjens had acquired none in the United States, viz., they had no right to designate the composition as a patented article when in fact there was no patent. From 1873 to 1880, while the patent was in life, they were entirely justified in calling it a patented article, and when that patent expired, it seems clear they had no right to retain the exclusive use of the only name which described the composition, and that no such right could be claimed by virtue of a valid trade-mark antedating the patent, for there was none, assuming even that such fact, if it had existed, would have justified the claim to the exclusive use of the descriptive words after the patent had expired.

The judgments in the Antwerp and Hamburg courts simply showed that in those countries the use of the words "Rahtjen's Composition" or "Rahtjen's Patent Composition" had become descriptive of the article itself and did not in any way designate the persons who manufactured it; but even without those judgments, the record shows beyond question that when the English patent expired the use of the words became open to the world as descriptive of the article itself, and to manufacture an article under that name was a right open to the world. There was no trade-mark in that name in the United States.

The principles involved in *Singer Manufacturing Company* v. *June Manufacturing Company*, (163 U. S. 169,) apply here.

It is said there is a distinction between the case at bar and the one cited, because in the latter the patent and the trade-mark were both domestic, while here the trade-mark is domestic and the patent foreign. The respondent claims the right to use these words by virtue of assignments from the Messrs. Rahtjen and also Suter, Hartmann & Co. in England, and also by virtue of a domestic trade-mark which it or its predecessors had acquired

from user and registration in the United States. The rights of Suter, Hartmann & Co. to the exclusive use of these words had been disclaimed by them in 1883, long before any assignment of their rights to the respondent, and we do not see why that disclaimer should be confined to England. It was a general disclaimer of any right whatever to the exclusive use of these words, and it was only upon the filing of that disclaimer that they obtained the trade-mark which they did in England. The disclaimer, however, was as broad as it could be made. When they assigned their rights the assignment did not include a right to an exclusive use which, in order to obtain the trade-mark registration, they had already disclaimed. The assignment of the Rahtjen firm could not convey the exclusive right to the use of such words, because they had no valid trade-mark in those words prior to 1873, and by the expiration of the English patent, in 1880, the right to that use had become public. These various assignors, therefore, did not convey by their assignment a right to the exclusive use of the words in the United States. The domestic trade-mark, which the respondent also claims gives it that right, was not used until after the sale of the composition by the petitioner in the United States under the name of "Rahtjen's Composition, Holzapfel's Manufacture." We think the principle which prohibits the right to the exclusive use of a name descriptive of the article after the expiration of a patent covering its manufacture applies here.

In the manufacture and sale of the article, of course, no deceit would be tolerated, and the article described as "Rahtjen's Composition" would, when manufactured by defendant, have to be plainly described as its manufacture. The proof shows this has been done, and that the article has been sold under a totally different trade-mark from any used by respondent, and it has been plainly and fully described as manufactured by defendant or its assignors, the Holzapfels.

We are of opinion that no right to the exclusive use in the United States of the words "Rahtjen's Composition" has been shown by respondent, and that the decree of the Circuit Court of Appeals for the Second Circuit should be reversed, and that of the Circuit Court for the Southern District of New York affirmed.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.